2590

No. 12299

United States
Court of Appeals
For the Ninth Circuit.

PAUL GAWZNER and IRENE GAWZNER,
Appellants,

vs.

LEO LEBENBAUM,
Appellee.

LEO LEBENBAUM,
Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,
Appellees.

Transcript of Record

In Two Volumes

Volume I

Pages 1 to 339

**Appeals from the United States District Court,
Southern District of California,
Central Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee and Cross-Appellant:

PAUL R. COTE

118 S. Beverly Drive
Beverly Hills, Calif. [1*]

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* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 3752-H Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA; PAUL GAWZNER, et al.,

Defendants.

ORDER TO DEPOSIT FUNDS UNDER MILITARY APPROPRIATIONS ACT.

Upon the reading and filing of the written Petition of the plaintiff, the United States of America, for an order to deposit certain funds under the Military Appropriations Act, approved June 28, 1944, on account of the just compensation to be determined in the above entitled action, and it appearing that the defendants, Leo Lebenbaum, Paul Gawzner and Irene Gawzner, by and through their respective counsel, have approved this Order as to form and substance, and good cause appearing therefore,

It Is Hereby Ordered that the plaintiff is hereby permitted to pay into the Registery of this Court the sum of $52,693.55 as an arbitrary estimate of just compensation for the period commencing July

10, 1944, and ending June 30, 1945, computed on a basis of $54,000.00 per annum.

It Ih Further Ordered, Adjudged and Decreed that upon any petition by a party in interest the Court may hereafter order and adjudge that distribution of said proceeds may be made to the persons as decreed by the Court to be entitled thereto at a rate not in excess of $4,500.00 per month for each month [2] that the plaintiff, the United States of America, has occupied the said premises and that said distribution shall be credited against the amount of the ultimate award, which may be made against the plaintiff, or decreeing the total amount of just compensation to be paid by the plaintiff.

It is Further Ordered that the deposit of said funds is without prejudice to the rights of the plaintiff to contend that the true and just compensation is less than such amount, and is likewise without prejudice to the rights of any party in interest to contend that the true and just compensation is in excess of such amount; that no interest shall accrue or be required to be paid upon the said sum so deposited.

Dated: This 22 day of March, 1945.

/s/ H. A. HOLLZER,
U.S. District Judge

Presented by:

/s/ EUGENE D. WILLIAMS,
Special Assistant to the Attorney General
Attorney for Plaintiff

Approved as to Form and Substance:
/s/ JOHN L. MACE,
Attorney for defendants Paul Gawzner and Irene Gawzner.
MacFARLANE, SCHAEFER & HAUN and JULIAN FRANCIS GOUX,
By /s/ RAYMOND HAUN,
Attorneys for defendant Leo Lebenbaum.

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Mar. 22, 1945. [3]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER DIRECTING THE PLAINTIFF TO DELIVER POSSESSION OF PREMISES TO DEFENDANT LEO LEBENBAUM

To the Plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, as counsel and to Defendants Paul Gawzner and Irene Gawzner, and to Messrs. Hill, Morgan & Farrer, attorneys for said defendants:

You and each of you will please take notice that on the 7th day of January, 1946, at the hour of 10 o'clock a.m., in the United States District Court, United States Post Office and Court House Building, Los Angeles, California, before the Honorable Harry A. Hollzer, Judge Presiding, the defendant

Leo Lebenbaum will move said Court for an order directing the plaintiff that upon the surrender of possession of the premises described in the plaintiff's Amended Complaint and which were under lease to the defendant Lebenbaum at the commencement of this action, to deliver the possession of said premises and the whole thereof to the defendant Lebenbaum, subject to all [22] of the terms, covenants and conditions of said lease.

Said motion will be made upon the ground that the defendant Lebenbaum was in the quiet and peaceful possession of said premises at the time of the commencement of this action; that the lease between said defendant and the defendants Gawzner has not been cancelled or terminated by the instant proceedings, and the defendant Lebenbaum is entitled to be restored to the possession of said premises when the plaintiff quits the possession thereof.

Said motion will be based upon the record, pleadings, and files hereof, and upon the Court's determination and conclusions in the pre-trial hearing.

MacFARLANE, SCHAEFER & HAUN,

By /s/ RAYMOND HAUN,

Attorneys for Defendant Leo Lebenbaum

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Dec. 28, 1945. [23]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER EXCLUDING CERTAIN DEFENDANTS FROM PARTICIPATION IN TRIAL PROCEEDINGS

To the plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, as counsel, and to Defendants Paul Gawzner and Irene Gawzner, and to Messrs. Hill, Morgan & Farrer, attorneys for said defendants:

You and Each of You Will Please Take Notice That on the 7th day of January, 1946, at the hour of 10 o'clock a.m., in the United States District Court, United States Post Office and Court House Building, Los Angeles, California, before the Honorable Harry A. Hollzer, Judge Presiding, the defendant Leo Lebenbaum will move said court for an order excluding the defendants Paul Gawzner and Irene Gawzner from participation in the trial of such condemnation proceedings insofar as said proceedings pertain to the real property covered by the written lease between the defendants Paul Gawzner and Irene Gawzner as Lessors and the defendant Leo Lebenbaum as Lessee. [25]

Said motion will be made upon the grounds that the defendants Paul Gawzner and Irene Gawzner are neither necessary nor proper parties defendant to said condemnation proceedings, and are not entitled either to appear or participate in such condemnation trial.

Said motion will be based upon the record, pleadings, and files hereof, and upon the Court's determination and conclusions in the pre-trial hearing, and upon the memorandum of authorities served and filed herewith.

Dated: December 27, 1945.

MacFARLANE, SCHAEFER & HAUN,

By /s/ RAYMOND HAUN,

Attorneys for Defendant Leo Lebenbaum.

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Dec. 28, 1945. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER RELEASING DEPOSITED FUNDS

To the plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, as counsel, and to Defendants Paul Gawzner and Irene Gawzner, and to Messrs. Hill, Morgan & Farrer, attorneys for said defendants:

You and Each of You Will Please Take Notice That on the 7th day of January, 1946, at the hour of 10 o'clock a.m., in the United States District Court, United States Post Office and Court House Building, Los Angeles, California, before the Honorable Harry A. Hollzer, Judge Presiding, the defendant Leo Lebenbaum will move said Court for an order:

1. Releasing to him for payment to the defendants Paul Gawzner and Irene Gawzner a sum of money from the funds deposited by the plaintiff in court equal to the minimum rental payments which are payable to said defendants Gawzner under the terms of the written [28] lease existing between the parties, and covering the period from July 10, 1944, to the date of surrender of possession of the property by plaintiff; and,

2. Releasing to the defendant Leo Lebenbaum from the funds deposited in court by the plaintiff the sum of Fifteen Thousand Dollars ($15,000.00) for the use of the said defendent in the reopening of the hotel premises and the current expenses thereof, necessitated by the surrender of possession by the plaintiff; and,

3. That such order be made without prejudice to the rights of any persons entitled to claim and receive just compensation for the use and occupancy of the premises, but said funds to be applied upon account of just compensation if and when such compensation be determined by the court.

Said motion will be made upon the grounds that the plaintiff has been in actual possession of and had exclusive use and occupancy of said premises, and that the defendants nor any of them have not received any funds whatsoever therefrom since July 10, 1944, and that the defendants Gawzner are at least entitled to immediate payment of all of the minimum rentals provided to be paid under the terms of said lease.

Said motion will be based upon the record, pleadings, and files hereof, and upon the Court's determination and conclusions in the pre-trial hearing.

Dated: December 27, 1945.

MacFARLANE, SCHAEFER & HAUN,

By /s/ RAYMOND HAUN,

Attorneys for Defendant Leo Lebenbaum

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Dec. 28, 1945. [29]

[Title of District Court and Cause.]

NOTICE OF OPPOSITION TO ORDER DIRECTING THE PLAINTIFF TO DELIVER POSSESSION OF THE PREMISES TO THE DEFENDANT LEO LEBENBAUM

To the Plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, and to Defendant, Leo Lebenbaum, and to Messrs. MacFarlane, Schaefer & Haun, Attorneys for said Defendant:

The defendants, Paul Gawzner and Irene Gawzner, hereby oppose the issuance of an order directing the plaintiff to deliver possession of the premises to the defendant, Leo Lebenbaum, upon the following grounds:

1. That one of the issues to be determined in

this case is whether or not the said Leo Lebenbaum is entitled to any compensation as the result of the taking of the property by the Government in aforesaid action. That it is the contention of the said defendants Gawzner that the commencement of said action [31] terminated the right of the said Leo Lebenbaum to receive any compensation whatsoever pursuant to the provisions of Paragraph Ten of the lease, by which the said Leo Lebenbaum was in possession of the said property at the time of the commencement of the said action, which provision of said lease is set forth in paragraph IV of the Answer of the said defendants Gawzner to plaintiff's second amended complaint in said action. That said provision of said lease provides that in event the State of California or the County of Santa Barbara or any other public body, shall by condemnation acquire any additional portion of the said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the said lessors, to wit, the said defendants Gawzner. That the said provision of said lease was pleaded in the foregoing Answer of the said defendants Gawzner and is one of the issues of said action to be determined by the Court at the trial of said action.

2. That said provision of said lease above referred to further provides that should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty per cent or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may

terminate the same on thirty days' written notice to the other. That it is further alleged in said Answer of the said defendants Gawzner, that said thirty days' notice was given by them to the said Leo Lebenbaum, and that as a result thereof said lease and the rights of the said Leo Lebenbaum therein under said lease to the property ceased and terminated on September 10, 1944.

Respectfully submitted,

HILL, MORGAN & FARRER,

By /s/ VINCENT MORGAN,

/s/ STANLEY S. BURRILL.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 2, 1946. [32]

[Title of District Court and Cause.]

NOTICE OF OPPOSITION TO ORDER RELEASING DEPOSITED FUNDS

To the Plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, and to Defendant, Leo Lebenbaum, and to Messrs. MacFarlane, Schaeffer & Haun, Attorneys for said Defendant:

The Defendants Gawzner hereby oppose the issuance of an order releasing to the defendant, Leo Lebenbaum, from the funds heretofore deposited in Court by the plaintiff, the sum of Fifteen Thousand Dollars ($15,000.00), or any amount whatsoever, for the use of the said defendant in the reopening of the hotel premises and the current expenses

thereof, or for any use or purpose whatsoever, or at all, upon the following grounds: [34]

1. That the purposes and uses for which said sum is sought to be released by the said defendant, Lebenbaum, are not purposes and uses for which compensation may be paid to the said defendant in said action.

2. That the said defendant, Leo Lebenbaum, as lessee of the premises sought to be condemned by plaintiff at the time of the commencement of said action, has not shown that his interest in and to said property by virtue of said lease is such an interest as to entitle said defendant to any compensation whatsoever. That the right of said defendant Leo Lebenbaum to any compensation in said condemnation action is dependant upon his ability to prove that said lease had a market or bonus value for and during the period of the occupancy of the said property by the Government. That the right of the said defendant to such compensation can only be determined by evidence to be taken at the trial of said action and is one of the issues to be determined in said action.

3. That the said defendant Leo Lebenbaum is not entitled to any compensation in said action by reason of the provisions of Paragraph Ten of the lease under which the said Leo Lebenbaum was lessee at the time of the commencement of said action, which provision of said lease is set forth in paragraph IV of the Answer of the said defendants, Paul Gawzner and Irene Gawzner, to plaintiff's second amended complaint in said action, and

which provision in substance provides that in the event of the acquisition of any additional portion of the leased premises by condemnation by the State of California or the County of Santa Barbara or any other public body, for highway or other public purpose, the amount of the award shall belong solely to the lessor, to wit, said defendants Gawzner.

4. That the amounts heretofore deposited by the plaintiff are wholly inadequate in amount to compensate the defendants Gawzner for the taking of said property by the said plaintiff, and that any payment of any portion of said monies now on deposit [35] to the said Leo Lebenbaum will result in reducing the amount of just compensation to the said defendants Gawzner and will prevent said defendants from receiving the full amount of just compensation due them.

Respectfully submitted,
HILL, MORGAN & FARRER,
By /s/ VINCENT MORGAN,
/s/ STANLEY S. BURRILL.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 2, 1946. [36]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Weinberger's Calendar April 30, 1946

The above entitled action is one in eminent domain brought by the United States of America for

acquisition of an estate in certain real and personal property described in the second amended complaint, the property commonly known as the Miramar Hotel, at Santa Barbara, California. The defendants in said action are Paul and Irene Gawzner, owners of the property described in the said complaint, Leo Lebanbaum, lessee from defendants Gawzner of a portion of the property involved, and various John Does, with which Doe defendants we are not presently concerned.

The lease took effect December 15, 1943, and by its terms continues until December 31, 1948, with option for a five year renewal. The government acquired an estate in the property involved herein beginning July 10, 1944. Plaintiff's counsel has announced that the United States is ready to terminate its possession of the premises and to tender the same to the person or persons entitled thereto.

The defendant Leo Lebenbaum has presented to the Court for decision three motions which are filed by him on December 28th, 1945 as follows:

No. 1

Motion for an order directing the plaintiff, the United States of America, upon the surrender of the possession of the premises described in the plaintiff's amended complaint and which were under lease to the defendant Lebenbaum at the commencement of this action, to deliver the possession of said premises and the whole thereof to the said defendant Lebenbaum, subject to all the terms, covenants and conditions of said lease.

This motion was made upon the grounds that said defendant was in the quiet and peaceful possession of said premises to the time of the commencement of this action; that the lease between the said defendant and the defendants Paul Gawzner and Irene Gawzner has not been cancelled or terminated by the instant proceedings, and the defendant Lebenbaum is entitled to be restored to the possession of said premises when said plaintiff quits the possession thereof.

Defendants Gawzner have filed notice of opposition to such motion, and contend that the commencement of this action terminated the right of the said Leo Lebenbaum to receive any compensation whatsoever pursuant to the provisions of Paragraph Ten of the lease, and that further, under the provisions of said paragraph and a notice given to the defendant lessee by the defendants lessors, the lease terminated on September 10, 1944.

Defendants Gawzner made a like contention in their first answer filed herein and also in such answer made like [39] assertion concerning the effect of Paragraph Ten of said lease. On June 30, 1945 the late Judge Hollzer rendered an opinion wherein he construed the effect of the condemnation proceedings upon the provisions of the lease, particularly Paragraph Ten thereof, and by said opinion ruled that by the provisions of the lease under consideration the parties thereto did not intend to effect a forfeiture of the lessee's rights under a state of facts such as those disclosed by the record then before Judge Hollzer. We see no

change in the record as it is now before us, except that the interest sought by the government has since been made certain in its duration. We have read the cases cited by Judge Hollzer in his opinion, and have considered the argument of counsel at the hearing before us and the cases cited by them, and conclude that Paragraph Ten of the lease does not refer to condemnation proceedings such as are involved herein, and that the lease has not been affected by such proceedings; that the government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy.

No. 2

Motion of the defendant Leo Lebenbaum for an order to exclude the defendants Paul Gawzner and Irene Gawzner from participation in the trial of the condemnation proceedings insofar as the same pertain to the real property covered by the written lease between the said defendants Paul Gawzner and Irene Gawzner as lessors and the defendant Leo Lebenbaum as lessee.

Said motion was made upon the ground that the said defendants Paul Gawzner and Irene Gawzner are neither the necessary or proper parties defendant to said condemnation [40] proceedings and are not entitled either to appear or participate in such condemnation trial, insofar as such leased property is concerned.

Plaintiff's complaint makes defendants Gawzner parties to these proceedings and prays that the

interest of each defendant should be determined and a proper apportionment made. It appears to this Court that the defendants Gawzner are necessary parties herein and that they should be allowed to participate at the trial in order that there may be a complete determination of the rights of all the parties herein in relation to all the property involved. The motion to exclude defendants Gawzner from participation in the trial should be denied.

No. 3

Motion of the defendant Leo Lebenbaum:

(a) That the Court release to him for payment to the defendants Paul Gawzner and Irene Gawzner a sum of money from the funds deposited by the plaintiff in Court equal to the minimum rental payments which are payable to the said defendants Gawzner under the terms of the written lease existing between the parties and covering the period from July 10th, 1944 to the date of the surrender of possession of the property by the plaintiff;

(b) That the Court further release to the defendant Leo Lebenbaum from the funds deposited in Court by the plaintiff the sum of $15,000.00 for use of said defendant in the re-opening of the hotel premises and guarantee expenses thereof necessitated by the surrender of the possession by the plaintiff; and

(c) That such order be made without prejudice to the rights of any persons entitled to claim [41] and receive just compensation for use and occu-

pancy of the premises but said funds to be applied upon account of just compensation as and when such compensation be determined by the Court.

Said above motion is made upon the ground that the plaintiff has been in actual possession of and had exclusive use and occupancy of said premises, and that the defendants, nor any of them, have not received any funds whatsoever therefrom since July 10th, 1944, and that the defendants Gawzner are at least entitled to immediate payment of all minimum rentals provided to be paid under the terms of said lease.

Defendants Gawzner filed their notice of opposition to any order releasing to the defendant Lebenbaum any of the deposited funds. However, at the hearing of the above motions, a discussion was had between counsel regarding the release of certain of said funds, and counsel for defendants Lebenbaum and Gawzner agreed to enter into a written stipulation permitting the release of certain of said funds, said stipulation to be prepared and submitted to the Court for its order in the premises.

Counsel for the Government at said hearing, stated that he had no objections to such release of certain of said funds, provided that said funds be applied on account of the just compensation as and when such compensation be determined by the Court. Said stipulation has not as yet been presented to the Court.

(Copies to counsel.)

[Endorsed]: Filed April 30, 1946. [42]

At a stated term, to wit: The February Term. A.D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 30th day of April in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Jacob Weinberger,
District Judge.

[Title of Cause.]

For the reasons set forth in the memorandum of conclusions this day filed herein, It Is Ordered: the motion for an order directing the plaintiff, upon surrender of possession of the premises covered by the lease between defendants Lebenbaum and Gawzners to make such surrender to defendant Lebenbaum is granted.

The motion to exclude defendants Gawzner from participation in the trial of the condemnation proceedings herein is denied.

The motion that the court release certain funds to defendant Lebenbaum is denied except to the extent agreed upon by counsel in open court at the hearing on said motions. Counsel are directed to reduce such agreement to writing and present the same forthwith to the court for its order, said order also to recite that the same is made without prejudice to the rights of any party as the same may appear after a hearing on the merits, and subject to the further order of this court. [43]

[Title of District Court and Cause.]

STIPULATION IN RE SURRENDER OF POSSESSION OF MIRAMAR HOTEL TO LEO LEBENBAUM, TENANT

The above entitled Court having, on April 30, 1946, made and entered its minute order, reading in part, as follows, to-wit:

"It is ordered: That the motion for an order directing the plaintiff, upon surrender of possession of the premises covered by the lease between defendants Lebenbaum and Gawzner, to make such surrender to defendant Lebenbaum, is granted."

And it appearing from a memorandum entitled "Memorandum of Conclusions," filed by the Court concurrently with the filing of said minute order, that the following conclusion is stated on page 3, lines 18 to 20, inclusive, to-wit:

"That the government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy."

And the plaintiff being desirous of tendering and surrendering possession of said premises and the whole thereof forthwith to said tenant (lessee) Leo Lebenbaum and said defendant, Leo Lebenbaum, being desirous and willing to forthwith accept full, final and exclusive surrender and possession thereof, subject to the conditions hereinafter noted, which conditions are acceptable [44] to the plaintiff;

Now, Therefore, It Is Stipulated:

I.

That the plaintiff may and does hereby immediately tender to defendant, Leo Lebenbaum, full, immediate and complete possession of the Miramar Hotel and of all improvements, furniture and fixtures of every kind and character heretofore taken from him at the time when plaintiff entered into possession, except to the extent that restoration and/or replacement are ultimately determined and required by judgment herein, and said defendant consents and agrees to forthwith accept and receive such surrender and to assume full, complete and exclusive possession thereof.

II.

That the actual date and time of such change in possession and control shall be evidenced by a written receipt executed by defendant Leo Lebenbaum in favor of the United States of America through the War Department, Office of the Division Engineer, Pacific Division, Real Estate Division, Los Angeles Sub-Office, reading as follows, to-wit:

The undersigned, Leo Lebenbaum, lessee of the Miramar Hotel, under the terms and provisions of that certain written lease executed by Paul Gawzner and Irene Gawzner as lessors and Leo Lebenbaum as lessee, dated December 15, 1943, pursuant to that certain stipulation between the undersigned and the United States of America in action entitled "United States v. 21 Acres of Land, more or less, in the County of Santa Barbara, etc. et al., No. 3752-W Civil" now pending in the District Court of the

Southern District of California, Central Division, dated May .., 1946, acknowledges that he has accepted full, complete and exclusive possession of the Miramar Hotel, Santa Barbara, California, together with all improvements thereon, including all furniture, fixtures and equipment as provided for in said stipulation; that such acceptance became effective on May 31, 1946 at 11:59 o'clock p.m.

(Signed).....

Leo Lebenbaum. [45]

III.

That upon the execution of said written receipt and delivery thereof to a representative of the War Department, the tenancy of the United States shall ipso facto case and determine.

IV.

That the execution of such receipt, the acceptance of possession of said premises and property, and the termination of such tenancy shall be without prejudice to the right of the defendant Leo Lebenbaum to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the time when plaintiff entered into possession, ordinary wear and tear excepted, and shall include a sum equivalent to the rental which shall be finally fixed in this proceeding for the base period between July 10, 1944 and November 20, 1945, computed on a monthly basis, for an additional two (2) months period next following June 1, 1946; which

additional sum shall be paid as part of the compensation for the restoration of the premises.

Dated: May 29, 1946.

UNITED STATES OF AMERICA,
Plaintiff,
By EUGENE D. WILLIAMS,
Special Assistant to the Attorney General.
By /s/ EUGENE D. WILLIAMS,
/s/ PAUL R. COTE,
Attorney for Defendant Leo Lebenbaum.

[Endorsed]: Filed June 17, 1946. [46]

[Title of District Court and Cause.]

STIPULATION IN RE SURRENDER OF POSSESSION OF PORTIONS OF PROPERTY TAKEN BY THE UNITED STATES

The above entitled Court having, on April 30, 1946, made and entered its minute order reading in part as follows, to wit:

"It Is Ordered: That the motion for an order directing the plaintiff, upon surrender of possession of the premises covered by the lease between defendants Lebenbaum and Gawzner, to make such surrender to defendant Lebenbaum, is granted."

And it appearing from a memorandum entitled

"Memorandum of Conclusions," filed by the Court concurrently with the filing of said minute order, that the following conclusion is stated on page 3, lines 18 to 20, inclusive, to wit:

"That the Government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy."

And, whereas, plaintiff and defendant, Leo Lebenbaum, have heretofore entered into a Stipulation under the terms of which plaintiff has surrendered to, and defendant Leo Lebenbaum has accepted possession of all of the premises [47] known as the Miramar Hotel, Santa Barbara, California, which were taken from him in these proceedings and which on July 10, 1944 were subject to the terms and provisions of a Lease between defendants Gawzner and Lebenbaum, dated December 15, 1943 (a true copy of which is annexed to the Answer of defendant Leo Lebenbaum to plaintiff's Second Amended Complaint, and marked and identified as "Exhibit A") and,

Whereas, such other real estate, improvements thereon, personal property and effects as were taken by the plaintiff in this proceeding on July 10, 1944 which were not included in the foregoing described Lease were taken from defendants Paul and Irene Gawzner, and

Whereas, plaintiff desires to and has formally tendered to said defendants Gawzner the immediate surrender of possession thereof, and said defendants Gawzner are agreeable to accepting and receiving possession thereof,

Now, Therefore, It Is Stipulated:

I.

That plaintiff may and does hereby immediately tender to defendants Paul Gawzner and Irene Gawzner, jointly and severally, full, immediate and complete possession of all of the real estate, improvements thereon, effects and personal property which plaintiff heretofore took in these proceedings on July 10, 1944, and which was and is not included within the terms and provisions of the Lease between defendants Gawzner and defendant Leo Lebenbaum, covering what is known as the Miramar Hotel, Santa Barbara, California, and dated December 15, 1943, except to the extent that restoration and/or replacement of any part or portion thereof are ultimately determined and required by Judgment herein, and said defendants, and each of them, consent and agree to forthwith accept and receive such surrender and to assume full, complete and exclusive possession thereof.

II.

That the actual date and time of such change in possession and control shall be evidence by a written receipt executed by defendants Paul and Irene Gawzner in favor of the United States of America through the War Department, Office of the Division Engineer, Pacific Division, Real Estate Division, Los Angeles Sub-Office, reading as follows, to wit:

"The undersigned, Paul and Irene Gawzner, as owner of all the real estate, improvements thereon,

effects and personal property taken by the United States of America in this proceeding (other than as contained in that certain Lease of the Miramar Hotel, Santa Barbara, in which the undersigned are lessors, and one Leo Lebenbaum is lessee, and which Lease is dated December 15, 1943) pursuant to that Stipulation between the undersigned and the United States of America, in an action entitled 'United States of America, v. 21 Acres of Land, more or less, in the County of Santa Barbara, etc., et al., No. 3752-W Civil,' now pending in the District Court of the Southern District of California, Central Division, dated June 10, 1946, acknowledge that they have accepted the full, complete and exclusive possession of the foregoing described property as provided for in said Stipulation; that such acceptance became effective on June .., 1946.

(Signed).....

Paul Gawzner

.....

Irene Gawzner''

III.

That upon the execution of said written receipt and delivery thereof to a representative of the War Department, the tenancy of the United States shall ipso facto cease and determine.

IV.

That the execution of such receipt, the acceptance of possession of said premises and property, and the termination of such tenancy shall be without preju-

dice to the right of the defendants, Paul Gawzner and Irene Gawzner, to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the time when plaintiff entered into possession, ordinary wear and tear excepted, and shall include a sum equivalent to the rental which shall be finally fixed in [49] this proceeding for the base period between July 10, 1944 and November 20, 1945, computed on a monthly basis, for an additional period next following the date of termination of tenancy as hereinabove fixed in Paragraph III hereof, equivalent to the time which shall subsequently be agreed upon or finally fixed and determined in this proceeding as the reasonable period necessarily required for such restoration.

Dated: June 10, 1946.

UNITED STATES OF AMERICA,
Plaintiff,
By /s/ EUGENE D. WILLIAMS,
Special Assistant to the
Attorney General,
Attorney for Plaintiff.

HILL, MORGAN & FARRER,
By /s/ STANLEY S. BURRILL,
Attorneys for Defendants,
Paul Gawzner and
Irene Gawzner.

[Endorsed]: Filed June 17, 1946. [50]

[Title of District Court and Cause.]

RECEIPT

The undersigned, Leo Lebenbaum, lessee of the Miramar Hotel, under the terms and provisions of that certain written lease executed by Paul Gawzner and Irene Gawzner as lessors and Leo Lebenbaum as lessee, dated December 15, 1943, pursuant to that certain stipulation between the undersigned and the United States of America in action entitled "United States v. 21 Acres of Land, more or less, in the County of Santa Barbara, etc., et al., No. 3752-W Civil," now pending in the District Court of the Southern District of California, Central Division, dated May 29th, 1946, acknowledges that he has accepted full, complete and exclusive possession of the Miramar Hotel, Santa Barbara, California, together with all improvements thereon, including all furniture, fixtures and equipment as provided for in said stipulation; that such acceptance became effective on May 31, 1946, at 11:59 o'clock p.m.

/s/ LEO LEBENBAUM.

[Endorsed]: Filed June 17, 1946. [52]

[Title of District Court and Cause.]

PETITION FOR WITHDRAWAL OF FUNDS ON DEPOSIT

To the Honorable District Court of the United States in and for the Southern District of California Central Division, and to the Honorable Jacob Weinberger, Judge thereof:

The petition of Paul Gawzner, Irene Gawzner and Leo Lebenbaum, defendants in the above-entitled action, respectively represents:

I.

The plaintiff above named, the United States of America, pursuant to orders of the Court theretofore made, has deposited in the Registry of the above-entitled Court on account of the just [53] compensation to be determined in the above-entitled action the following sums of money on the dates set opposite such sums, to wit:

Date	Amounts
March 23, 1945	$52,693.55
November 20, 1945	13,500.00
April 25, 1946	7,500.00
Total	$73,693.55

II.

There has heretofore been withdrawn from said fund pursuant to order of the above-entitled Court the sum of $1,594.02, leaving a balance on deposit in the said Registry as of this date the sum of $72,099.53.

III.

By the terms of the orders authorizing such deposits all or any part of such sum may now be paid out to the parties entitled thereto.

IV.

That these petitioning defendants are the only persons interested in or who have any right to receive any portion of the award which may be made in this action for the use and occupancy by the plaintiff, the United States of America, of the property known as the Miramar Hotel and Bungalows, Santa Barbara County, California, or for the rehabilitation and/or restoration of any of the said property or of the personal property contained therein during the term of the occupancy of said property by said plaintiff; regardless of any allocation of such award which ultimately may be made among these defendants by adjudication or agreement.

V.

That by the terms of the orders heretofore made by this Court authorizing the deposit of said funds, it is provided [54] that upon distribution of the funds so deposited the amount of such distribution shall be credited against the amount of the ultimate award which may be made against the plaintiff herein.

That these petitioning defendants are willing and hereby agree that upon the making of the distribution hereby prayed to be made to them, each and all

of them will acknowledge satisfaction to the extent of the full amount of such distribution of the judgment ultimately to be entered herein fixing the total amount of such compensation to be paid by the plaintiff.

Wherefore these petitioning defendants pray that the Court make its order that there be withdrawn from the funds now on deposit in the Registry of the above-named Court the sum of Sixty-Five Thousand Dollars ($65,000), which shall be paid to the defendants Leo Lebenbaum, Paul Gawzner and Irene Gawzner, jointly.

Dated this 29th day of August, 1946.

/s/ LEO LEBENBAUM.
PAUL COTE and
THOMAS H. HEARN.
By /s/ THOS. H. HEARN,
Attorneys for Defendant,
Leo Lebenbaum.
/s/ PAUL GAWZNER,
/s/ IRENE GAWZNER.
HILL, MORGAN & FARRER.
By /s/ STANLEY H. BURRILL,
Attorneys for Defendants
Gawzner.

We hereby acknowledge receipt of a copy of the foregoing petition and consent that the same may be granted and that the Court [55] may order the withdrawal from the funds deposited in the Registry of the Court in the above-entitled action the sum of

Sixty-five Thousand Dollars ($65,000) in accordance with the prayer of the foregoing petition.

JAMES M. CARTER,
United States Attorney for the Southern District of California.

JAMES F. McPHERSON,
Special Assistant to the Attorney General.

By /s/ PAUL R. SCHNAITTER,
Special Attorney, Department of Justice.

Attorneys for Plaintiff.

Upon the filing of the foregoing petition in open court and good cause appearing therefor, It Is Hereby Ordered:

I.

That the Clerk of the above-entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited in the above-entitled action the sum of Sixty-Five Thousand Dollars ($65,000) to the defendants Leo Lebenbaum, Paul Gawzner and Irene Gawzner jointly.

II.

That the sums so paid out as aforesaid shall be ultimately applied on account of the just compensation as shall hereafter be agreed upon or awarded in the above-entitled action.

Dated this .... day of ....., 1946.

....., Judge.

[Endorsed]: Filed Aug. 29, 1946. [56]

[Title of District Court and Cause.]

RESPONSIVE STATEMENT OF PLAINTIFF IN CONNECTION WITH DEFENDANTS' PETITION FOR WITHDRAWAL OF FUNDS ON DEPOSIT

On March 5, 1945, there was received in connection with the above action, in the Los Angeles office, Lands Division, Department of Justice, a United States Treasurer's check in the amount of $52,693.55 payable to the Clerk of the United States District Court for the Southern District of California, together with a letter containing instructions with reference to the deposit of said check. The pertinent instructions contained in the letter were as follows:

"Please secure a stipulation for an order permitting the deposit of the check into the registry of the court for the benefit of the parties entitled thereto, to be distributed in advance of judgment upon proper order of the court, such distribution to be credited against the amount of the ultimate award and to be without prejudice to the right of the owner to claim a larger amount; provided, however, that no distribtuion is to be made in excess of [57] $4,500.00 per month for each month that the United States has occupied the premises at the time such distribution is made."

The defendants in this case refused to enter into a stipulation for the order whereupon further instructions were obtained by the Los Angeles office from the Department of Justice authorizing the

filing of a motion for an order permitting the deposit upon the terms hereinabove set forth. Thereafter, such petition was served and filed and on the 22nd day of March, 1945, the Honorable Harry A. Hollzer, United States District Judge, entered an order authorizing plaintiff to pay said sum into the Registry of the Court "as an arbitrary estimate of just compensation for the period commencing July 10, 1944, and ending June 30, 1945," and further providing "that upon any petition by a party in interest the court may hereafter order and adjudge that distribution of said proceeds may be made to the persons as decreed by the Court to be entitled thereto at a rate not in excess of $4,500.00 per month for each month that the plaintiff, the United States of America, has occupied the said premises, and that said distribution shall be credited against the amount of the ultimate award, which may be made against the plaintiff, or decreeing the total amount of just compensation to be paid by the plaintiff."

Said Order further provided that the deposit was without prejudice to the rights of the plaintiff to contend that the true and just compensation was less than such amount and likewise without prejudice to any party in interest to contend that just compensation was in excess of said amount.

Thereafter on November 20, 1945, and April 25, 1946, deposits of $13,500.00 and $7,500.00, respectively, were allowed to be made under similar orders.

The petition for withdrawal of funds on deposit proposed to be filed by the defendants Leo Lebenbaum, Paul Gawzner and Irene Gawzner, has been examined by the attorneys for the plaintiff and, in their opinion, the disbursement prayed for therein, if made, will be in [58] accordance with the conditions set forth in the letter of instruction in connection with said deposits and the orders entered fixing the terms under which such deposits might be disbursed.

Dated: This 29th day of August, 1946.

JAMES M. CARTER,
United States Attorney.

By /s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

/s/ PAUL R. SCHNAITTER,
Special Attorney, Lands
Division,
Department of Justice.

[Endorsed]: Filed Aug. 29, 1946. [59]

[Title of District Court and Cause.]

RECEIPT

The undersigned, Paul and Irene Gawzner, as owners of all the real estate, improvements thereon, effects and personal property taken by the United States of America in this proceeding (other than

as contained in that certain Lease of the Miramar Hotel, Santa Barbara, in which the undersigned are lessors, and one Leo Lebenbaum is lessee, and which Lease is dated December 15, 1943) pursuant to that Stipulation between the undersigned and the United States of America, in an action entitled "United States of America v. 21 Acres of Land, More or Less, in the County of Santa Barbara, etc., et al., No. 3752-W Civil," now pending in the District Court of the Southern District of California, Central Division, dated June 10, 1946, acknowledge that they have accepted the full, complete and exclusive possession of the foregoing described property as provided for in said Stipulation; that such acceptance became effective on June 18, 1946.

/s/ PAUL GAWZNER,
/s/ IRENE GAWZNER.

[Endorsed]: Filed Sept. 13, 1946. [61]

[Title of District Court and Cause.]

THIRD AMENDED COMPLAINT IN CONDEMNATION

Comes Now the plaintiff, United States of America, by James M. Carter, United States Attorney, as its attorney, and on application of the Secretary of War of the United States of America, hereinafter sometimes referred to as the "requesting officer," and under the direction of and by the au-

thority of the Attorney General of the United States of America, for cause of action against the above named defendants, and each of them, and leave of Court being first duly had and obtained, files this its Third Amended Complaint in Condemnation, and complains and alleges:

I.

That the plaintiff, the United States of America, is entitled to acquire, by the exercise of its power of eminent domain, [63] the property hereinafter referred to and described, for the uses and purposes hereinafter set forth.

II.

That in accordance with the provisions of the hereinafter referred to statutes, said requesting officer, for and in behalf of the United States of America, has designated that the property hereinafter described is suitable and necessary for the purposes of the United States of America, and has selected said property for acquisition by the United States of America in these proceedings, and said selection, designation and determination ever since have been and are now in full force and effect; that the purposes for which the plaintiff is taking the property as hereinafter alleged are necessary and constitute a public use, which use is authorized by law; that the acquisition thereof by plaintiff is and will be of the greatest public benefit and to the least private injury; that the plaintiff is informed and believes, and upon such information and belief alleges, that no part of said property has heretofore been appropriated by any per-

son for any public use, and if any part or portion thereof has heretofore been appropriated to a public use prior to the use of plaintiff, the use to which said property herein sought to be condemned and appropriated by plaintiff will put is a more necessary and paramount public use.

III.

That the plaintiff has named herein by their true names or by fictitious names all defendants known by it to have some interest in said property; that there may be other persons having some interest therein whom the plaintiff hereby identifies as unknown persons, and plaintiff makes such unknown persons defendants herein, to the end that said property may be vested in the United States of America to the extent hereinafter prayed for.

IV.

That plaintiff is informed and believes, and upon such [64] information and belief alleges, that the property hereinafter described constitutes a whole parcel of property, and not a part of such parcel.

V.

That the defendants Doe One to Doe Five Hundred, inclusive, and One Doe Corporation, a corporation, to Twenty-five Doe Corporation, a corporation, inclusive, are sued herein under the fictitious names hereinabove set out, for the reason that the true names of said defendants are unknown to the plaintiff; that when said true names of

said defendants are ascertained, plaintiff will amend its Third Amended Complaint and insert herein the true names of said defendants.

VI.

That any, every and all of the defendants herein named claim and assert some right, title, interest or estate in, or lien, encumbrance, servitude, easement, charge or demand on, or in respect to, the property in this Third Amended Complaint described, or some part thereof.

VII.

That Robert P. Patterson is now, and at all of the times herein mentioned has been, the Secretary of War of the United States of America; that in such capacity as the said Secretary of War he is the requesting officer for the plaintiff, United States of America, on whose application the within Third Amended Complaint in Condemnation is being filed; that he has, while so acting as hereinabove alleged, selected the hereinabove referred to and hereinafter described property for use for the stablishment of Redistribution Station and related military purposes, and has designated and determined that the use and occupancy of said property is immediately required in connection therewith, pursuant to the authority of the Acts of Congress hereinafter set out.

VIII.

That this is a suit of a civil nature, brought by the [65] plaintiff under the authority of and pur-

suant to the provisions of an Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; U.S.C. §171), and the Act commonly known as the Second War Powers Act, being, to wit, Act of Congress approved March 27, 1942 (Public Law 507—77th Congress); that funds for the acquisition herein alleged have been appropriated by the Congress of the United States by an Act of Congress approved July 1, 1943 (Public Law 108—77th Congress).

IX.

That the estate or interest to be taken in the hereinabove referred to and hereinafter described property is for a term of years commencing July 10, 1944, and ending June 1, 1946, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon, by or for the United States.

That the property hereinabove referred to consists of those lands hereinafter described and all personal property located on said lands and used in connection with the operation of the hotel situated thereon, excepting foods and beverages, and also excepting all personal property owned by guests, tenants and employees of said hotel, and excepting, further, the

accounting records of the hotel; that there is annexed to the First Amended Complaint and marked as Exhibit "A," which by such reference is included herein and made a part hereof as if herein set out in full, a list and description of all personal property, the use of which is herein condemned and taken by the plaintiff as herein alleged; that the said lands hereinabove referred to are situated in the County of Santa Barbara, and are more particularly described as follows: [66]

Parcel 1

Lots 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25-A, Oceanside Tract, being a portion of Pueblo Lot 32 Montecito School District, in the County of Santa Barbara, State of California, as per County Assessors Book 2, Page 24 on file in the office of the County Assessor of said County.

Excepting therefrom any portion of Lots 17, 18, 19, 20 and 25-A lying within State Highway No. 101.

Parcel 2

A portion of Pueblo Lot 32, shown as Parcel 7 on County Assessors Map, filed in Book 2, Page 24 in the office of the County Assessor in Montecito School District, County of Santa Barbara, State of California.

Excepting therefrom that portion lying within the Southern Pacific Railway Company Right-of-Way and that portion lying within State Highway No. 101.

Containing 7.652 acres, exclusive of the exceptions.

Parcel 3

Lots 37 and 38, Oceanside Beach Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessors Book 2, Page 28, on file in the office of the County Assessor of said County.

X.

That the apparent and presumptive owners of the hereinabove described property are Paul Gawzner and Irene Gawzner; that said property is commonly and generally known as the Miramar Hotel, Santa Barbara, California.

XI.

That the defendants One Doe Company to Twenty-five Doe Company, inclusive, are corporations duly organized and existing under and by virtue of the laws of one of the States of the United States, and each of them is qualified to do and doing business in the State of California. [67]

XII.

That the said Secretary of War of the United States has determined that the acquisition of the leasehold which is herein sought to be condemned is necessary for use as Redistribution Station and Related Military Purposes, and for such other uses as may be authorized by Congress or by Executive Order, and has determined that immediate and ex-

clusive possession of the said property, the improvements thereon, and the personal property hereinabove referred to is necessary for the prosecution of the present war.

XIII.

That under the provisions of the Second War Powers Act of 1942 it is provided, in part, as follows:

"Upon and after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used and improved for the purposes of the Act, notwithstanding any other law."

That the Secretary of War has, in accordance with the provisions of the said Second War Powers Act of 1942, determined that the immediate use and occupancy of the above described and referred to property, real and personal, are required in furtherance of the national war effort, and has directed immediate occupancy thereof.

Wherefore, plaintiff prays judgment:

1. That the Court ascertain and assess the value of the leasehold interest herein sought to be condemned and taken in the said property, both real and personal;

2. Adjudging that the public uses for which plaintiff takes and condemns said property are necessary public uses of the plaintiff, and that the uses to which said property are to be applied are uses authorized by law, and that all of the said property so taken is necessary thereto;

3. Vesting in the United States of America the

title and [68] estate in and to the said property as hereinabove alleged, and adjudging that said title and estate in the said property shall be deemed to be condemned and taken for the use of the United States for the purposes and uses hereinabove set forth; and further adjudging that the right to just compensation for the said property hereinabove described shall be vested in the persons entitled thereto as their respective interests may appear and be established by judgment herein;

4. That an Order issue from this Court vesting the right to immediate possession in the plaintiff of all of the property hereinabove described and sought to be condemned in this action, for the use of the United States of America for the purposes and uses hereinabove set forth;

5. That all liens or encumbrances of record against the property herein sought to be taken and condemned be satisfied out of the award to be made in this proceeding;

6. For such other and further relief as the Court deems meet and proper in the premises and as the nature of the case may require.

JAMES M. CARTER,
United States Attorney.
By /s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

Receipt of copy acknowledged.

[Lodged]: Oct. 21, 1946.

[Endorsed]: Filed Oct. 23, 1946. [69]

[Title of District Court and Cause]

STIPULATION FOR JUDGMENT

(Including Deficiency)

It Is Hereby Stipulated by and between the United States of America, plaintiff in the above entitled action, through its attorneys of record, and upon the express authority and direction of the Attorney General of the United States, and defendant Leo Lebenbaum, by Paul R. Cote and Thomas H. Hearn, Esqs., his attorneys of record, and defendants Paul Gawzner and Irene Gawzner, by Hill, Morgan & Farrer, and Stanley S. Burrill, Esqs., their attorneys of record that

Whereas, the above entitled and numbered proceeding has been instituted by plaintiff to determine the just compensation to be paid by it for the condemnation and taking by plaintiff of the estate or interest in the property hereinafter described, together with the damages arising through its obligation to make certain restoration to said property, all as set forth and described in plaintiff's Third Amended Complaint and hereinafter in this Stipulation; and [71]

Whereas, the stipulating parties have agreed upon the compensation to be paid by the plaintiff for such condemnation and taking and such damage, as aforesaid;

Now, Therefore, It is Stipulated and Agreed:

I.

The authority of the United States to execute this Stipulation is the express direction and authorization of the Attorney General of the United States, by David L. Bazelon, Assistant Attorney General, Lands Division, Department of Justice, directed to the United States Attorney at Los Angeles, dated November 22, 1946, and reading as follows to-wit,

"Re condemnation Miramar Hotel, Civil 3752-W. Settlement approved for $205,000, without interest, providing deficiency paid before January 5, 1947. Davil L. Bazelon, Assistant Attorney General."

II.

The authority of the above named counsel for the respective defendants who have hereinafter signed and executed this Stipulation is expressly contained and set forth on the last page hereof.

III.

That judgment may be forthwith entered herein in which there is condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July 10, 1944, and ending June 1, 1946; subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and

personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution Station and related military [72] purpose;

(b) That the sum of $205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in sub-paragraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; provided, however, that the deficiency provided for and set forth in sub-paragraph (c) herein shall have been paid into the Registery of this court on or before January 5, 1947; otherwise, and in the event that default be made in the deposit of such deficiency on or before such date, such deficiency shall draw interest commencing January 6, 1947 at the rate of six per cent per annum, such interest to continue until the payment and deposit of the full amount thereof into the Registry of this court;

(c) That plaintiff has heretofore deposited into the Registry of the court, in partial satisfaction

of its obligation to pay just compensation, as provided in sub-paragraph (b) hereof, sums totalling $73,693.55; that although plaintiff took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant Leo Lebenbaum, who was then [73] the lessee in possession under defendants Paul Gawzner and Irene Gawzner, was, upon his request, permitted and allowed to operate said premises as the Miramar Hotel until noon of July 15, 1944, in consideration of his agreement to pay the United States of America the sum of $1,672.23, which sum was to be credited in favor of the United States upon any obligation thereof to pay compensation for the taking of said premises; that such total credits amount to the sum of $75,365.78, and, by reason thereof, there will remain a deficiency of $129,634.22; that such judgment shall provide that the sum of $129,634.22, without interest, be paid by plaintiff into the Registry of the court on or before January 5, 1947, and in default thereof, interest at six per cent per annum shall accrue thereon and be paid by plaintiff as heretofore provided in sub-paragraph (b);

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it within a reasonable time after July 1, 1946, as provided, set forth, and reserved in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises.

IV

That if compentent witnesses were sworn and testified, their testimony would be that the sum of $205,000, without interest, together with the surrender of plaintiff's right to remove improvements and structures placed upon said premises by it and the vesting of title thereto in the legal owner of said premises, constitutes fair, just, and adequate compensation to be paid by plaintiff to the parties entitled [74] thereto for the taking of the estate and interest described in Paragraph III in the real and personal property hereinafter described in Paragraph V, together with full satisfaction of all damages which have accrued, or will accrue, by reason of the plaintiff's failure to make restoration, as more particularly set forth and described in subparagraph (b) of Paragraph III.

V

That the property in which the right or interest has been taken by the United States, described in Paragraph III, hereof is more particularly described as follows, to-wit:

Those lands hereinafter described and all personal property located on said lands and used in connection with the operation of the Miramar Hotel situated thereon, excepting foods and beverages, and also excepting all personal property owned by guests, tenants, and employes of said hotel, and excepting further the accounting records of said hotel;

That said lands are situated in the County of

Santa Barbara, State of California, and are more particularly described as follows:

Parcel 1

Lots 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25-A, Oceanside Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 24, on file in the Office of the County Assessor of said County. Excepting therefrom any portion of lots 17, 18, 19, 20, and 25-A lying within State Highway No. 101. [75]

Parcel 2

A portion of Pueblo Lot 32, shown as Parcel 7 on County Assessor's Map, filed in Book 2, Page 24, in the Office of the County Assessor in Montecito School District, County of Santa Barbara, State of California. Excepting therefrom, that portion lying within the Southern Pacific Railway Company Right of Way and that portion lying within State Highway No. 101. Containing 7.652 acres, exclusive of the exceptions.

Parcel 3

Lots 37 and 38, Oceanside Beach Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 28, on file in the Office of the County Assessor of said County.

That the personal property heretofore referred to is listed, described, and set forth in a document marked "Exhibit A," annexed to the First Amended

Complaint herein, which by such reference is included herein and made a part hereof as if herein set out in full.

VI.

That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of $205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that defendant, Leo Lebenbaum, shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of $1,672.23. [76]

These stipulating defendants voluntarily appear in this action and expressly waive service of process, the right of trial by jury, notice of setting of within matter for trial, the preparation, service, and filing of Findings of Fact and Conclusion of law, notice of entry of judgment, and the right to move for new trial or appeal, in so far as the issues which are fixed and determined by this Stipulation and by the Judgment to be entered pursuant thereto are concerned.

Dated: This 26th day of November, 1946.

UNITED STATES OF AMERICA,
Plaintiff.
By JAMES M. CARTER,
United States Attorney, and
IRL D. BRETT,
Special Assistant to the Attorney General.
By /s/ IRL D. BRETT,
Its Attorneys.
PAUL R. COTE and THOMAS H. HEARN.
By /s/ THOS. H. HEARN,
Attorneys for Defendant Leo Lebenbaum.

I expressly authorize and direct my attorneys Paul R. Cote and Thomas H. Hearn, to execute the foregoing Stipulation in my name and behalf.

Dated: This 26th day of November, 1946.

/s/ LEO LEBENBAUM,
Defendant.
HILL, MORGAN & FARRER and STANLEY S. BURRILL,
By /s/ STANLEY S. BURRILL,
Attorneys for Defendants PAUL GAWZNER AND IRENE GAWZNER.

We expressly authorize and direct our attorneys, Hill, Morgan & Farrer and Stanley S. Burrill, to execute the foregoing Stipulation in our name and behalf.

Dated: This 26th day of November, 1946.
/s/ IRENE GAWZNER,
/s/ PAUL GAWZNER.

[Endorsed]: Filed Nov. 26, 1946. [77]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 3752-W Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, more or less, in the County of Santa Barbara, State of California; PAUL GAWZNER, et al.,

Defendants.

JUDGMENT AND DECREE IN CONDEMNATION

(Including Deficiency)

There having been filed and presented to the Court in the above entitled action a Stipulation for Judgment executed by the plaintiff, United States of America, by its attorneys of record, and by defendant, Leo Lebenbaum, by Paul R. Cote and Thomas H. Hearn, Esqs., his attorneys of record, and defendants, Paul Gawzner and Irene Gawzner, by Hill, Morgan & Farrer and Standley S. Burrill, Esqs., their attorneys of records; and

It appearing that said stipulating defendants have

voluntarily appeared in this action and have expressly waived service of process, the right of trail by jury, notice of setting the within matter for trial, the preparation, service, and filing of Findings of Fact and Conclusion of Law, notice of entry of judgment, and the right to move for new trial or appeal in so far as the issues which are fixed and determined by said Stipulation and by this Judgment are concerned; and [78]

It appearing that such Stipulation is executed by the United States upon the express direction and authorization of the Attorney General of the United States and is executed by said counsel for and in behalf of the above named defendants upon their express authorization and direction;

Now, Therefore, upon application jointly made by plaintiff and said defendants, and each of them, by and through said attorneys of record and pursuant to said Stipulation,

It Is Hereby Ordered, Adjudged, and Decreed:

I.

That there be and is hereby condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July 10, 1944, and ending June 1, 1946; subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and

personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution Station and related military purposes;

(b) That the sum of $205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in sub-paragraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same conditions as it was when it was received by the [79] plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; provided, however, that the deficiency provided for and set forth in subparagraph (c) herein shall have been paid into the Registry of this Court on or before January 5, 1947; otherwise, and in the event that default be made in the deposit of such deficiency on or before such date, such deficiency shall draw interest commencing January 6, 1947 at the rate of six per cent per annum, such interest to continue until the payment and deposit of the full amount thereof into the Registry of this Court;

(c) That plaintiff has heretofore deposited into the Registry of the Court, in partial satisfaction of its obligation to pay just compensation, as provided

in sub-paragraph (b) hereof, sums totalling $73,-693.55; that although plaintiff took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant, Leo Lebenbaum, who was then the lessee in possession under defendants, Paul Gawzner and Irene Gawzner, was, upon his request, permitted and allowed to operate said premises as the Miramar Hotel until noon of July 15, 1944, in consideration of his agreement to pay the United States of America the sum of $1,672.23, which sum was to be credited in favor of the United States upon any abligation thereof to pay compensation for the taking of said premises; that such total credits amount to the sum of $75,-365.78, and, by reason thereof, there will remain a deficiency of $129,634.22; that the sum of $129,634.22, without interest, be paid by [80] plaintiff into the Registry of the Court on or before January 5, 1947, and in default thereof, interest at six per cent per annum shall accrue thereon and be paid by plaintiff as heretofore provided in sub-paragraph (b);

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it within a reasonable time after July 1, 1946, as provided, set forth, and reserved in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises.

II.

That the property in which the right or interest has been taken by the United States, described in Paragraph I hereof, is more particularly described as follows, to-wit:

Those lands hereinafter described and all personal property located on said lands and used in connection with the operation of the Miramar Hotel situated thereon, excepting foods and beverages, and also excepting all personal property owned by guests, tenants, and employes of said hotel, and excepting further the accounting records of said hotel;

That said lands are situated in the County of Santa Barbara, State of California, and are more particularly described as follows:

Parcel 1

Lots 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25-A, Oceanside Tract, being a [81] portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 24, on file in the Office of the County Assessor of said County. Excepting therefrom any portion of Lots 17, 18, 19, 20, and 25-A lying within State Highway No. 101.

Parcel 2

A portion of Pueblo Lot 32, shown as Parcel 7 on County Assessor's Map, filed in Book 2, Page 24, in the Office of the County Assessor in Montecito School District, County of Santa Barbara, State of

California. Excepting therefrom that portion lying within the Southern Pacific Railway Company Right of Way and that portion lying within State Highway No. 101. Containing 7.652 acres, exclusive of the exceptions.

Parcel 3

Lots 37 and 38, Oceanside Beach Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 28, on file in the Office of the County Assessor of said County.

That the personal property heretofore referred to is listed, described, and set forth in a document marked "Exhibit A," annexed to the First Amended Complaint herein, which by such reference is included herein and made a part hereof as if herein set out in full.

III.

The Court retains jurisdiction hereof to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which is hereby ordered paid by the plaintiff herein, the same as though a jury had rendered a verdict for said sum of $205,000, [82] without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, accepting that defendant, Leo Lebenbaum, shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of $1,672.23.

Dated: This 26 day of November, 1946.

/s/ JACOB WEINBERGER,
Judge of U.S. District Court.

Presented by:

JAMES M. CARTER,
United States Attorney
IRL D. BRETT,
Special Assistant to the Attorney General

By /s/ IRL D. BRETT,
Attorneys for Plaintiff,
United States of America

Approval as to form and substance and consent to the entry of said Judgment are hereby given:

PAUL R. COTE and
THOMAS H. HEARN

By /s/ THOS. H. HEARN,
Attorneys for Defendant,
Leo Lebenbaum

HILL, MORGAN & FARRER
STANLEY S. BURRILL

By /s/ STANLEY S. BURRILL,
Attorneys for Defendants,
Paul Gawzner and Irene Gawzner.

Judgment entered Nov. 26, 1946.

Docketed Nov. 26, 1946.

[Endorsed]: Filed Nov. 26, 1946. [83]

[Title of District Court and Cause.]

STIPULATION AND ASSIGNMENT OF INTEREST IN AWARD

Whereas, the parties to this stipulation and assignment, to wit, Leo Lebenbaum, Paul Gawzner and Irene Gawzner, are defendants in the above-entitled proceedings; and

Whereas, the said Paul Gawzner and Irene Gawzner as lessors and the said Leo Lebenbaum as lessee made and entered into a lease dated December 15, 1943, of those certain premises commonly known and referred to as Miramar Hotel and Bungalows, Santa Barbara, California, which said lease is hereby referred to for the particulars thereof; and

Whereas, upon the plaintiff in the above-entitled action having taken possession of said Miramar Hotel and Bungalows pursuant [84] to the above-entitled proceedings, the said Leo Lebanbaum transferred to Paul Gawzner and Irene Gawzner the retail liquor license theretofore used in connection with the operation of said Miramar Hotel and Bungalows and thereafter upon the consent of said Irene Gawzner said license was transferred to Paul Gawzner solely; and

Whereas, the said Paul Gawzner and Irene Gawzner have contended and still contend that the aforesaid lease has been cancelled by the filing of the above-entitled action and the Notice of Cancellation dated August 4, 1944, given by the said Paul Gawzner and Irene Gawzner to said Leo Lebenbaum, reference to which said Notice of Cancellation is made for the particulars thereof; and

Whereas, the above-entitled Court has heretofore ruled that said lease has not been cancelled and that possession of said premises should be returned by plaintiff to defendant Leo Lebenbaum and possession of said premises has in fact been returned to said Leo Lebenbaum and he is in possession thereof; and

Whereas, the said Paul Gawzner and Irene Gawzner are contending that said orders are not final but are subject to appeal upon the conclusion of the trial of the above action and the rendition of the Interlocutory Judgment in condemnation therein; and

Whereas, said Leo Lebenbaum has demanded the re-assignment to him of said retail liquor license used in connection with said Miramar Hotel and Bungalows; and

Whereas, the said Paul Gawzner and Irene Gawzner are willing to re-assign said retail liquor license upon condition that such action shall be without prejudice to their rights and upon the further condition that such retail liquor license will be returned to them upon the happening of certain conditions:

Now, Therefore, it is hereby mutually agreed by and between the parties hereto as follows: [85]

I.

Said Paul Gawzner hereby agrees to promptly reassign and transfer said retail liquor license to said Leo Lebenbaum.

II.

Said Leo Lebenbaum agrees that he will not sell, assign, transfer or encumber said retail liquor license or permit the same to be sold, assigned or transferred, and upon the termination of said lease dated December 15, 1943, or the sooner determination thereof, whether such sooner determination of said lease results from the above-entitled litigation or otherwise, the said Leo Lebenbaum shall reassign said retail liquor license to said Paul Gawzner and Irene Gawzner or their nominee, at once.

III.

Each of the parties hereto agree that said retail liquor license is being transferred to said Leo Lebenbaum only to permit him to use the same for the sale of beer, wines and liquors on the premises of said Miramar Hotel and Bungalows and only so long as he is entitled to the possession thereof under said lease dated December 15, 1943, and that said Leo Lebenbaum owns no right, title, interest or estate in said retail liquor license except the right to use the same in conjunction with such lease.

IV.

That this stipulation and assignment is made without prejudice to the rights of any of the parties hereto in said litigation to assert and maintain any and all claims which they have heretofore advanced or may hereafter advance in said litigation and the assignment of said retail liquor license or the acceptance thereof under the terms and conditions

of this stipulation shall not operate to estop the parties hereto, or either of them, to assert any rights for which they have heretofore or may hereafter contend, nor shall [86] the assignment of said retail liquor license or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties hereto in such litigation.

V.

Said Leo Lebenbaum agrees to pay all expenses in connection with the reissuance and assignment of said retail liquor license.

VI.

I, said Leo Lebenbaum, first certifying that I have not heretofore made any full or partial assignment thereof, hereby assign to Paul Gawzner and Irene Gawzner and to their heirs, executors, administrators, successors and assigns, all of my rights, titles, interests, estates, benefits, claims, compensation and awards to which I may now be entitled or may hereinafter be entitled under and by virtue of the above-entitled proceedings, including all of my rights, titles, interests, estates, benefits, claims, compensation and awards which I may be entitled to receive from the aforesaid United States of America, or any of its departments or branches, by virtue of said United States of America having taken possession of the property described in the Complaint and Amended Complaints of the above-entitled action or incident thereto, including all my rights of damages for injury done

to said Miramar Hotel and Bungalows and the personal property located therein arising out of the above-entitled proceedings and the rights exercised by the United States of America pursuant thereto, including all my rights, rights of action, claims, damages, debts, awards and rights to awards, compensation and rights to compensation, which I now have or may hereafter acquire by reason of the United States of America having taken possession of the premises described in the Complaint or Amended Complaints on file herein on or about July 10, 1944, and continuing in possession thereof, arising either under the rights exercised by the United States of America by [87] virtue of the above-entitled proceedings, or arising by virtue of the United States of America having taken possession of said premises under said Second War Powers Act, or otherwise; provided however, that the total amount of monies so assigned shall not exceed the sum of $12,500.00.

And the Condition of This Agreement Is Such that if upon the termination of said lease of said Miramar Hotel and Bungalows dated December 15, 1943, or the sooner determination thereof, said Leo Lebenbaum reassigns to said Paul Gawzner and Irene Gawzner, or their nominee, said retail license, then this assignment shall be of no force and effect, or if such retail liquor license be not so reassigned, then this assignment shall be effective to the extent necessary so that said Paul Gawzner and Irene Gawzner shall be reimbursed for any loss, cost, or

damage suffered by them for the failure of said Leo Lebenbaum to reassign said retail liquor license in accordance with his agreement so to do.

Dated this 23rd day of July, 1946.

/s/ LEO LEBENBAUM,
/s/ PAUL GAWZNER,
/s/ IRENE GAWZNER.

Approved:

PAUL COTE,
By /s/ THOMAS H. HEARN,
Attorneys for defendant,
Leo Lebenbaum,
HILL, MORGAN & FARRER,
By /s/ STANLEY S. BURRILL,
Attorneys for defendants
Gawzner.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 12, 1946. [88]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 3752-W Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, More or Less, in the County of Santa Barbara, State of California: PAUL GAWZNER, et al.,

Defendants,

PAUL GAWZNER and IRENE GAWZNER,

Cross-Complainants,

vs.

LEO LEBENBAUM,

Cross-Defendant.

NOTICE OF MOTION TO FILE ANSWER TO THIRD AMENDED COMPLAINT AND CROSS-COMPLAINT AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

To the United States of America, the plaintiff above named, and to James M. Carter, United States Attorney and to Irl D. Brett, Special Assistant to the Attorney General; [90]

To Leo Lebenbaum, defendant and cross-defendant, and to Messrs. Paul R. Cote and Thos. H. Hearn, his attorneys:

You and Each of You Will Please Take Notice that on Tuesday, March 18, 1947, at the hour of 10:00 A.M. in the court room of the Honorable Jacob Weinberger, Judge of the above-entitled Court, on the second floor of the United States Post Office and Court House Building, Los Angeles, California, the defendants and cross-complainants Paul Gawzner and Irene Gawzner will move said Honorable Court as follows:

1. That the matter of the apportionment of the award between the defendants in the above-entitled cause that is presently on the calendar of said Honorable Court for trial on March 18, 1947, at the hour of 10:00 A.M. be placed off calendar for the the reason that said matter is not at issue between the said defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum for the reason that there are no present pleadings placing in issue the matter of dispute between said defendants;

2. For leave to file on behalf of the defendants and cross-complainants Paul Gawzner and Irene Gawzner their Answer to the Third Amended Complaint and Cross-Complaint, a copy of which said Answer to the Third Amended Complaint and Cross-Complaint, which it is proposed shall be filed by said Paul Gawzner and Irene Gawzner, is served upon you concurrently with the service of this Notice of Motion and Points and Authorities.

Said motion will be made upon the ground that the above-entitled Court did on October 23, 1946,

permit the plaintiff in the above-entitled action to file its Third Amended Complaint; that said Third Amended Complaint was never served upon the defendants [91] Paul Gawzner and Irene Gawzner after the same was permitted to be filed by the above-entitled Honorable Court; that by the filing of said Third Amended Complaint the Answer theretofore filed by the defendants Paul Gawzner and Irene Gawzner to the Second Amended Complaint was without further force and effect as was the Answer theretofore filed by the defendant Lebenbaum to the Second Amended Complaint and that, accordingly, there are no issues properly framed between the defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum showing their respective contentions in reference to the right to the award made in the above-entitled cause and upon the further ground that the proper method by which to frame issues as to the conflicting claims of the respective defendants is by way of cross-complaint.

Dated this 14th day of March, 1947.

HILL, MORGAN & FARRER,

By /s/ STANLEY S. BURRILL,

Attorneys for defendants and cross-complainants, Paul Gawzner and Irene Gawzner. [92]

Points and Authorities in Support of Motion to File Answer to Third Amended Complaint and Cross-Complaint

1. The practice and procedure in this cause conforms to State practice.

Title 40 U.S.C.A. Section 258

2. Plaintiff may be allowed the right to amend upon such terms as may be just and upon notice to the defendants.

Section 473, California C.C.P.

3. Defendants may be allowed the right to answer after the time limited by law.

Section 473, California C.C.P.

4. An amended complaint must be served on all the adverse parties who are to be joined by the judgment and an amended complaint supersedes the original and thereafter the original complaint ceases to have any effect as a pleading.

Linott v. Rowland, 119 Cal. 452, 454

Sheehy v. Roman Catholic Archbishop, 49 Cal. App. (2d) 537, at 539:

"It is general rule, and one which is too well settled to be longer open to question, that when a complaint is amended in substance as distinguished from a mere matter of form it operates to open a default and must be served on all adverse parties affected including the defaulting party."

At 541:

"Not only did the filing of the amended complaint [93] vacate the default of the defendant entered on December 11, 1935, but it superseded the original complaint which dropped out of the case and ceased to have any effect as a pleading or as a basis for a judgment."

Gutleben v. Crossley, 13 Cal. App. (2d) 249; 56 Pac. (2d) 954

Collins v. Scott, 100 Cal. 446; 34 Pac. 1085

21 Cal. Juris. 224, Pleadings 156:

"If a complaint is amended on leave after the parties have been brought into court, a copy of the amendments or amended complaint must be served upon all of the defendants to be affected thereby, unless the amendment is in a matter of form, rather than of substance, or unless service is waived by answering."

21 Cal. Juris. 229, Pleadings, 159:

"A defendant has ten days, after an amendment of a complaint as of course, in which to answer or demur; and he must answer other amendments to the complaint, or the complaint as amended, within ten days after service thereof, or such other time as the court in its discretion may direct." [94]

5. The proper procedure in a eminent domain action when one defendant claims interests in the property or the award contrary to the claims of the other defendant is to answer the complaint and cross-complain against the other defendants.

People v. Buellton Development Co., 58 Cal. App. (2d) 178

Section 442, California C.C.P.

6. When a plaintiff amends his complaint in a material matter defendant has a right to plead de novo to the amended complaint.

Wilson v. First National Trust & Savings Bank, 73 Cal. App. (2d) 446, 450; 166 Pac. (2d) 593

7. A defendant may at the time of answering file a cross-complaint or many with permission of the court subsequently file a cross-complaint.

Section 442, California C.C.P.

8. The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint or answer alleging facts material to the case occurring after the former complaint or answer.

Section 464, California C.C.P.

9. Matters occurring pending the action should be set forth by supplemental pleadings.

21 Cal. Juris., pages 171 and 173, Pleadings, Section 118, 119 [95]

10. Unless a party has suffered an actual loss in some specified particular he should receive no compensation in a condemnation proceedings.

City of Los Angeles vs. Harper, 139 Cal. App. 331

Flood Control District v. Andrews, 52 Cal. App. 788

Receipt of copy acknowledged.

[Endorsed]: Filed March 14, 1947. [96]

[Title of District Court and Cause.]

ANSWER TO THIRD AMENDED COMPLAINT AND CROSS-COMPLAINT

Come Now the defendants and cross-complainants Paul Gawzner and Irene Gawzner and leave of Court being first had and [98] obtained file this their answer to plaintiff's Third Amended Complaint and Cross-Complaint against the defendant and cross-defendant Leo Lebenbaum as follows.

Answering plaintiff's Third Amended Complaint the defendants Paul Gawzner and Irene Gawzner admit, deny and allege as follows:

I.

That said Paul Gawzner and Irene Gawzner admit the allegations in Paragraphs I, II, IV, VII, VIII, IX, X, XII and XIII of plaintiff's Third Amended Complaint.

II.

That said Paul Gawzner and Irene Gawzner allege that they are now and at all times mentioned herein were the owners of the property sought to be condemned herein and that no other person or persons, whether named in said Third Amended Complaint or otherwise, have any right, title, interest, estate, claim or lien in and to said property.

III.

That said Paul Gawzner and Irene Gawzner allege that on or about the 15th day of December, 1943, that said Paul Gawzner and Irene Gawzner

executed a written lease whereby they, as lessors, leased to said Leo Lebenbaum, as lessee, for a term of five (5) years and fifteen (15) days, commencing on December 15, 1943, and ending on December 31, 1948, a portion of the property described in plaintiff's Third Amended Complaint. That attached hereto, marked "Exhibit A" and made a part hereof as though herein set forth at length is a true and correct copy of said lease. That pursuant to said lease said Leo Lebenbaum entered into the possession of the leased premises and continued in possession thereof until the date of taking by the plaintiff as hereinafter set forth.

That the property sought to be condemned and described [99] in the Third Amended Complaint includes certain property owned by said Paul Gawzner and Irene Gawzner, which is not included within, nor subject to said lease, to wit:

(a) Lots 13, 15, 16, 17, 18 and 25-A of Oceanside Tract as described in said Third Amended Complaint;

(b) That portion of Parcel No. 2 described in said Third Amended Complaint which lies outside of the boundaries of the leased property as described in said lease, Exhibit A; and

(c) Lots 37 and 38 Oceanside Beach Tract as described in said Third Amended Complaint.

The property sought to be condemned by said Third Amended Complaint includes, however, all of the leased property as described in said lease, Exhibit A.

Upon the filing of the original complaint herein and on July 10, 1944, the plaintiff took possession of the property described in said complaint and the Third Amended Complaint and retained the possession thereof to and including June 1, 1946.

IV.

That said Paul Gawzner and Irene Gawzner allege that pursuant to the provisions of Paragraph X of said lease, Exhibit A, the said Paul Gawzner and Irene Gawzner on August 11, 1944, served upon said Leo Lebenbaum thirty (30) days written notice of termination of said lease by reason of the condemnation of the leased premises as set forth in the original complaint on file herein, being the same property sought to be condemned by the Third Amended Complaint, and by reason thereof said lease terminated on September 10, 1944.

Allege that by reason of the provision of Paragraph X [100] of said lease, Exhibit A, the entire amount of any award in this condemnation proceeding belongs solely to said Paul Gawzner and Irene Gawzner.

V.

The said Paul Gawzner and Irene Gawzner further allege that said Leo Lebenbaum has not, since the commencement of this action and the taking of possession of the property referred to in plaintiff's original Complaint, Second Amended Complaint and Third Amended Complaint, paid any of the rental or other moneys provided for by said lease, Exhibit A, and has not compiled with any of the

other provisions thereof during the period described in said Third Amended Complaint, nor has said Leo Lebenbaum paid to said Paul Gawzner and Irene Gawzner any sum of money whatsoever for said period of July 10, 1944, to June 1, 1946.

VI.

That said Paul Gawzner and Irene Gawzner further allege that upon the termination by the said plaintiff of the taking, use and occupation of said property the said plaintiff became obligated to restore said property described in said Third Amended Complaint in the same condition that it was in prior to the taking by the plaintiff and to place the same in condition for its operation as a hotel. That plaintiff failed to make such restoration.

That said Paul Gawzner and Irene are further informed and believe and, therefore, allege that by the use and occupation of the said property by the said plaintiff the said premises have become permanently depreciated and damaged.

The said Paul Gawzner and Irene Gawzner further allege that the plaintiff was obligated to pay just compensation for the taking of the property described in the Third Amended Complaint for the period therein set forth and for the said restoration of said premises. [101]

VII.

The said Paul Gawzner and Irene Gawzner further allege that on or about November 26, 1946,

a Judgment and Decree in Condemnation was made and entered in the above-entitled cause, reference to which said Judgment is hereby made for the terms and particulars thereof. That said Judgment in substance provided that there was condemned and vested in the plaintiff an estate or interest in the property described in plaintiff's Complaint, Second Amended Complaint and Third Amended Complaint, both real and personal, for a term of years commencing July 10, 1944, and ending June 1, 1946, and which said Judgment fixed the just compensation to be paid by plaintiff in the sum of $205,000 as full settlement and satisfaction of its obligation for the taking of such interest or estate, together with all compensation to be paid as damages arising out of any failure or default on the part of plaintiff in performance of its obligation to restore such premises so taken by it to the same condition as they were in when received by the plaintiff, including compensation for the time estimated to be required for the completion of such restoration.

Allege that said Judgment further provided that the Court retain jurisdiction of the within cause to determine the amount of the interests of all parties who have appeared in said proceeding and who might thereafter appear in said proceeding, if any, in and to the compensation which was thereby ordered paid by the plaintiff, the same as though a jury had rendered a verdict for said sum of $205,000 as their total award for all interests taken by the plaintiff in this proceeding and full

satisfaction of all claims for damages against the United States arising from such taking, excepting that said Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him the payment of the sum of $1,672.23.

Come Now the Defendants and Cross-Complainants Paul Gawzner and Irene Gawzner and Complain of the Defendant and Cross-Defendant Leo Lebenbaum and for Cause of Action Allege:

I.

Cross-complainants Paul Gawzner and Irene Gawzner re-allege and incorporate by reference, as though herein set forth at length, the admissions, denials and allegations set forth in Paragraphs I to VII, inclusive, of their Answer to the Third Amended Complaint hereinabove set forth.

II.

That upon the termination of the use of the premises described in plaintiff's Third Amended Complaint by said plaintiff, the United States of America, possession of the same was returned to cross-defendant Leo Lebenbaum on or about June 1, 1946.

III.

That said cross-complainants Paul Gawzner and Irene Gawzner contend and allege that the said lease, Exhibit A, has been cancelled, by the institution of the above-entitled proceedings and the giving of notice by the said cross-complainants to the

said cross-defendant, on September 11, 1944, as hereinabove set forth.

IV.

That subsequent to June 1, 1946, and prior to July 23, 1946, the said cross-complainants Paul Gawzner and Irene Gawzner refused to recognize said cross-defendant Leo Lebenbaum as lessee of said premises or entitled to the possession thereof and refused to accept rental payments from him contending that the said lease had been cancelled as aforesaid. [103]

V.

That on or about July 23, 1946, the said cross-complainants Paul Gawzner and Irene Gawzner and cross-defendant Leo Lebenbaum made and entered into a certain agreement in writing covering the continued possession of the said Leo Lebenbaum in and to said premises described in said lease dated December 15, 1943, Exhibit A; that attached hereto, marked "Exhibit B" and made a part hereof as though herein set forth at length is a true and correct copy of said agreement. [104]

XX.

Cross Complainants Paul Gawzner and Irene Gawzner allege that said cross defendant Leo Lebenbaum has failed to comply with the terms of said agreement of July 23, 1946, Exhibit B, in that he, said Leo Lebenbaum, has failed to maintain the premises described in said lease, Exhibit A, in the condition required by said lease.

XXI.

That said Leo Lebenbaum has not since June 1, 1946, restored said premises to the condition they were in at the time the [109] United States of America took possession of said premises on July 10, 1944.

XXII.

That cross complainants Paul Gawzner and Irene Gawzner allege that said cross defendant Leo Lebenbaum by reason of the allegations hereinabove set forth is not entitled to receive any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the restoration of said premises.

XXIII.

That cross complainants Paul Gawzner and Irene Gawzner are informed and believe and, therefore, allege that said cross defendant Leo Lebenbaum's interest in said lease dated December 15, 1943, Exhibit A, did not have a market or bonus value on July 10, 1944, irrespective of whether the same was cancelled by the institution of the within cause of action and the giving of the notice, hereinabove referred to, or not, and, therefore, allege that said cross defendant Leo Lebenbaum is not entitled to any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the rental value or use of said premises.

XXIV.

That cross complainants Paul Gawzner and Irene Gawzner further allege that the cross defendant Leo Lebenbaum is not entitled to any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the premises not covered by said lease, Exhibit A.

XXV.

That cross complainants Paul Gawzner and Irene Gawzner further allege that said cross defendant Leo Lebenbaum is not entitled [110] to any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the restoration of the exterior of said premises covered by said lease, Exhibit A.

XXVI.

That Paragraph Ten of said lease, Exhibit A, provides that the amount of the award in any condemnation suit referred to in said paragraph shall belong solely to the lessors therein named, to wit, cross-complainants Paul Gawzner and Irene Gawzner. That by reason of the provisions of said Paragraph Ten said cross-defendant Leo Lebenbaum is not entitled to any share or portion of the award heretofore made in the above-entitled

proceedings by said Judgment dated November 26, 1946.

XXVII.

That said Leo Lebenbaum has heretofore received upon account of any compensation found to be due him, if any, the sum of $1672.23, all as heretofore found by said Judgment dated November 26, 1946. That said cross-defendant Leo Lebenbaum was not entitled to receive such sum of $1672.23 from the plaintiff in the above-entitled proceedings and, therefore, said cross-defendant received said sum of $1672.23 for the use and benefit of cross-complainants.

Wherefore, the defendants and cross-complainants Paul Gawzner and Irene Gawzner pray:

1. That the Court find that Paul Gawzner and Irene Gawzner are the only persons who have any interest in or to the award made in the above-entitled proceedings by said Judgment dated November 26, 1946, and that the Court shall order that there be paid out of the Registry of the Court all funds heretofore deposited in the Registry [111] of the Court by the plaintiff in the above-entitled proceedings pursuant to said Judgment dated November 26, 1946, which have not heretofore been paid and that the Court further determine that said defendant and cross-defendant Leo Lebenbaum is not entitled to receive and portion of said award of $205,000 fixed and determined by said Judgment dated November 26, 1946, in the above-entitled proceedings; and

2. For such other and further relief as to the Court seems proper.

HILL, MORGAN & FARRER.
By /s/ STANLEY S. BURRILL,
Attorneys for Defendants and Cross-Complainants
Paul Gawzner and Irene Gawzner. [112]

EXHIBIT B

Agreement

Whereas, the parties hereto Paul Gawzner and Irene Gawzner, as lessors, and Leo Lebenbaum, as lessee, made and entered into a lease dated December 15, 1943, of those certain premises commonly known and referred to as Miramar Hotel and Bungalows, Santa Barbara, California, which said lease is hereby referred to for the particulars thereof; and

Whereas, on or about July 10, 1944, the United States of America filed an action in condemnation in the District Court of the United States in and for the Southern District of California, Central Division, entitled "United States of America, plaintiff, vs. 21 Acres of Land, More or Less, in the County of Santa Barbara, etc., Paul Gawzner, et al, defendants," being numbered therein 3752-W Civil, seeking to acquire the use and possession of said Miramar Hotel and Bungalows for a term of years, reference to which said action is hereby made for the particulars thereof; and

Whereas, the said Paul Gawzner and Irene Gawzner contended and still contend that the aforesaid

lease has been cancelled by the filing of the above-referred to action and the Notice of Cancellation dated August 4, 1944, given by said Paul Gawzner and Irene Gawzner to said Leo Lebenbaum, reference to which said Notice of Cancellation is made for the particulars thereof; and

Whereas, the Court in said above referred to action has heretofore ruled that said lease has not been cancelled and that possession of said premises be returned by the plaintiff therein named to said Leo Lebenbaum and possession of said premises has in fact been returned to said Leo Lebenbaum and he is in possession thereof; and [113]

Whereas, the said Paul Gawzner and Irene Gawzner are contending that said orders are not final but are subject to appeal upon conclusion of the trial of the above-referred-to action and the rendition of the interlocutory judgment in condemnation therein; and

Whereas, said Leo Lebenbaum has been in possession of said premises since June 1, 1946, and is contending that he is lawfully in possession thereof under said lease and is willing to pay the rent called for by said lease for the period of time he is in occupancy of said premises after June 1, 1946, and did in fact make a tender of a portion of said rent on June 1, 1946, which was refused by said Paul Gawzner and Irene Gawzner for the reason that they are contending the said lease has been cancelled and said Leo Lebenbaum is not lawfully in possession of said premises and that

said Leo Lebenbaum is a trespasser on said premises and liable to said Paul Gawzner and Irene Gawzner as such; and

Whereas, the parties hereto have concurrently herewith executed certain other stipulations and agreements:

Now, Therefore, in consideration of the premises and the mutual covenants herein contained, it is hereby agreed as follows:

I.

Leo Lebenbaum will promptly pay to said Paul Gawzner and Irene Gawzner all sums of money which said Paul Gawzner and Irene Gawzner should receive as rent under the terms of said lease commencing as of June 1, 1946, and will make all other payments and deposits and otherwise comply with the terms of said lease, the same as though said lease was in full force and effect so long as he, the said Leo Lebenbaum, is in possession of said Miramar Hotel and Bungalows.

II.

If upon final determination of the above-referred-to action it be determined that said lease was in law and in fact cancelled [114] by the filing of said action and the giving of such notice of cancellation by said Paul Gawzner and Irene Gawzner, then said Paul Gawzner and Irene Gawzner agree that upon said Leo Lebenbaum delivering possession of said Miramar Hotel and Bungalows including all of the furniture, furnishings, tools, implements and

other personal property used in the operation of the same in good order and condition, including the retail liquor license used in connection therewith, to said Paul Gawzner and Irene Gawzner, they, said Paul Gawzner and Irene Gawzner, will accept such payments as full compensation for the use and occupancy of said Miramar Hotel and Bungalows, including the said furniture, furnishings, tools, implements and other personal property and retail liquor license by said Leo Lebenbaum subsequent to June 1, 1946; that this agreement shall be effective only for the period subsequent to June 1, 1946, and shall not be construed to have any effect upon the award or the share or shares thereof which said parties are entitled to receive in the above-referred-to action.

III.

This agreement is made without prejudice to the rights of any of the parties hereto to assert and maintain in the litigation hereinabove referred to any and all claims which they have heretofore advanced or may hereafter advance in said litigation and the payment of said funds or the acceptance thereof under the terms and conditions of this agreement shall not operate to estop the parties or either of them to assert any rights for which they have heretofore or may hereafter contend, nor shall the payment of said funds or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties in such litigation.

IV.

Said Leo Lebenbaum hereby consents that the said Paul Gawzner and Irene Gawzner may lease the main floor of the garage [115] building referred to in said lease to any third person, firm or corporation to be used for the purpose of service station and garage, including storage and repair of automobiles, provided that said Leo Lebenbaum shall be granted use rent free of at least one-half of the basement of said garage building either for the storage of cars of his guests or his own supplies and materials.

In Witness Whereof the parties hereto have hereunto set their hands this 23rd day of July, 1946.

/s/ LEO LEBENBAUM,

/s/ PAUL GAWZNER,

/s/ IRENE GAWZNER.

[Lodged]: March 14, 1947.

[Endorsed]: Filed Mar. 18, 1947. [116]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 3752-H Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA; PAUL GAWZNER; IRENE GAWZNER; LEO LEBENBAUM; DOE ONE TO DOE FIVE HUNDRED, INCLUSIVE; ONE DOE CORPORATION, a Corporation, TO TWENTY-FIVE DOE CORPORATION, a Corporation, Inclusive,

Defendants.

ANSWER OF DEFENDANT LEO LEBENBAUM TO SECOND AMENDED COMPLAINT

Comes now the defendant, Leo Lebenbaum, and answering the Second Amended Complaint for himself alone, admits, denies, and alleges:

I.

Admits the allegations of Paragraphs I, II, III, V, VII, VIII, XI, XII, and XIII.

II.

Answering Paragraph IV this defendant denies that the property described in the complaint constitutes a whole parcel of property and not a part

of such parcel, and alleges, as more fully set forth in the affirmative defense hereto, that there are differing estates in different parts or portions of the property described. [117]

III.

In answer to Paragraph VI of said complaint, this defendant admits that he claims and asserts some right, title, interest, and estate in and in respect to a portion of the property described in said complaint, the nature and extent of the estate of this defendant being fully and at length set forth in the affirmative defense filed as a part hereof, and denies that any other person or defendant claims or asserts any right, title, interest, or estate in or in respect to the real property described in the affirmative defense made a part hereof, except as such right, title, interest, or estate may be subject and subordinate to the estate of this defendant. This defendant further alleges that the right, title, interest, and estate of this defendant in and to the portion of the real property described in the complaint and in which this defendant has such estate, is fully and at length set forth in the affirmative defense made a part hereof.

IV.

In answer to Paragraph IX this defendant admits each and all of the allegations thereof, except that this defendant denies that the estate or interest to be taken in the premises described in the complaint is for a term of years commencing July

10, 1944, and ending November 20, 1945, and alleges that the date of expiration of said term is June 30, 1946, as is hereinafter affirmatively alleged.

V.

In answer to Paragraph X, this defendant denies each and all of the allegations thereof except that this defendant admits that Paul Gawzner and Irene Gawzner are the owners of the property described in the affirmative defense made a part hereof, subject, however, to the leasehold estate and interest of this defendant as fully and at length set forth in said Affirmative Defense made a part hereof.

By Way of a First Affirmative Defense Herein, This Defendant Alleges:

I.

That he claims and asserts a right, title, interest, and estate in and to that portion of the property described in the complaint as is more fully set forth and described herein, and alleges that the estate of this defendant is a leasehold estate acquired under and by virtue of a certain written lease hereinafter referred to.

II.

This defendant alleges that on or about the 15th day of December, 1943, this defendant, as lessee, and Paul Gawzner and Irene Gawzner, husband and wife, as lessors, made, executed and entered into a certain written lease providing for an original term of five years and fifteen days commencing on

the 15th day of December, 1943, and ending on the 31st day of December, 1948, and with an option on the part of the lessee to renew and extend the term of said lease for an additional period of five years, but providing that such option of renewal be exercised on or before June 30, 1948. The said lease covered that portion of the property described in plaintiff's complaint as is more particularly described as follows:

The furnished hotel known as Miramar Hotel and Bungalows, situated upon that certain real property in El Montecito, County of Santa Barbara, State of California, to wit:

Parcel A: Beginning at the southeast corner of Jacob Oleson's land surveyed March 29, 1876; thence 1st north 1606 feet to the northeast corner of aforementioned tract; 2nd, east 176.39 feet to the northwest corner of Dayton's land; 3rd, south 495 feet; thence 4th, east 293.81 feet; thence [119] 5th, south 478.37 feet more or less to a point in the center line of the Coast Highway at the northwesterly corner of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official Records of said County at page 4; thence 6th, north 70°16′ west along the center line of said Coast Highway 23.70 feet; thence south 0°27′ west 327.38 feet to the beginning of a curve to the right having a central angle of 83°01′ and a radius of 40 feet; thence along said curve a distance of 57.96 feet to the beginning of a tangent to said curve; thence along said tangent south 83°28′ west 202.70 feet;

thence south 4°03′ east to a point in the southerly line of Parcel Four of the above mentioned Gawzner deed; thence westerly along said southerly line of Parcel Four to the point of beginning.

Excepting, however, all that portion thereof lying north of the center line of the Coast Highway as now located.

Also Excepting that portion thereof lying within the lines of the strip of land known as the Southern Pacific right of way.

Also Excepting that portion thereof, if any, included within the lines of the tract of land quitclaimed to David S. Cook, Sr., by Emmeline Doulton, by deed dated December 19, 1903, and recorded in Book 98, at page 86 of Deeds, records of said County.

Also Excepting therefrom that portion thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in [120] Book 552, at Page 275, Official Records of Santa Barbara County, California.

Parcel B: Lots 8, 9, 12, 19, 20, 21, 22, 23, and 24 of Ocean Side subdivision, in said County of Santa Barbara, State of California, according to the map thereof recorded in Book 1, at page 29 of Maps and Surveys in the office of the County Recorder of said County and the following described portion of Lot 13 of said subdivision:

Beginning at the southeasterly corner of said Lot 13 in the center of Ocean Avenue; thence west along the south line of said Lot 13, 240.24 feet more or less to the southwesterly corner thereof; thence

north along the west line of said lot 6.42 feet; thence east 138.54 feet; thence south 77°39′ east 14.02 feet; thence east 88.0 feet to a point in the easterly line of said lot in the center of Ocean Avenue; thence south along said east line 3.42 feet to the point of beginning.

Excepting from said Lots 21, 22, and 23, the westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Harriet Dorr Doulton, dated March 27, 1899, and recorded in Book 66, at page 427 of Deeds, records of said County.

Also Excepting from said Lot 24, the southerly and westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Mrs. H. M. A. Postley, dated January 31, 1899, and recorded in Book 66, at page 73 of Deeds, records of said County.

Also Excepting from said Lots 19 and 20 [121] the portions thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in Book 552, at page 275, Official Records of Santa Barbara County, California.

Parcel C: Beginning at a point on the easterly line of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official records of said County at page 4, said point being distant thereon south 0°32′30″ west 232.10 feet from the northeasterly corner thereof; thence along said easterly line of Parcel Two south 0°32′30″ west 96.12 feet to the southeasterly corner thereof; thence

along the southerly line of said Parcel Two north 88°55′ west 80.03 feet to the beginning of a curve to the right having a central angle of 89°22′ and a radius of 25 feet; thence along said curve 38.99 feet to the beginning of a tangent to said curve; thence along said tangent north 0°27′ east 51.10 feet; thence south 89°33′ east 88.0 feet; thence north 0°27′ east 19.0 feet; thence south 89°33′ east 16.91 feet to the point of beginning.

Parcel D: A right of way for road purposes for the benefit of the lands described in Parcels A, B and C above, over the following land:

Beginning at the northwesterly corner of Parcel two as described in the above-mentioned Gawzner deed said corner being on the center line of the Coast Highway; thence along said center line north 70°16′ west 23.70 feet; thence south 0°27′ west 327.38 feet; thence south 89°33′ east 30.0 feet; north 0°27′ east 316.88 feet to a point in the center line of the Coast Highway; [122] thence along said center line north 70°16′ west 8.08 feet to the point of beginning.

In addition to the real property so described, the said lease covered and included all of the improvements situated upon the said real property and all of the furniture, furnishings, tools, implements, and other personal property used in the operation of the hotel erected and constructed upon said real property, an itemized inventory of said personal property having been made and identified by the parties to said lease.

Said written lease contained all of the terms, covenants and conditions with respect to the said leasehold estate, and a copy of said lease is hereto annexed, marked Exhibit "A" and made a part hereof, to all intents and purposes and with like force and effect as though fully and at length set forth herein.

III.

That in accordance with and pursuant to said lease, this defendant entered into possession of the leased premises and the whole thereof and continued to occupy and be in the possession thereof until the date of taking by the plaintiff and his eviction therefrom by the plaintiff on or about July 10, 1944, and the plaintiff has at all times since retained the possession of the leased premises and the whole thereof and has occupied and used said leased premises to the exclusion of this defendant.

IV.

That the co-defendants, Paul Gawzner and Irene Gawzner, the lessors under said lease, have asserted and maintained that the leasehold estate of this defendant was terminated and ended by reason of the acts of the plaintiff in the taking of possession of said leased premises and said co-defendants have further asserted and maintained that the leasehold estate of this defendant has been terminated by virtue of Paragraph Ten of said lease, but this de-

fendant alleges that the said leasehold estate has not been [123] terminated and ended either by the acts of the plaintiff or under any of the provisions of the said lease, and that this defendant is entitled to the full use and enjoyment of the leased premises subject only to the temporary right of occupancy thereof by the plaintiff upon payment of just compensation by the plaintiff to this defendant and upon the termination of such temporary occupancy by the plaintiff, this defendant is entitled to re-occupy, use, and be restored to the full possession and enjoyment of the said leasehold estate.

V.

That with respect to that portion of the real property described in plaintiff's complaint and which is the subject of the leasehold estate of this defendant, the co-defendants, Paul Gawzner, and all other co-defendants have not any right in or to the compensation and damages to be awarded by this Court, but the entire amount of any such award or compensation and damages in this proceeding pertaining to the said portion of the premises covered by said lease belongs solely to this answering defendant.

VI.

That this defendant has suffered damages and is entitled to just compensation from the plaintiff by reason of its condemnation, use and occupancy of the leasehold estate of this defendant, and this de-

fendant alleges that just compensation is the sum of $150,000.00 per year for each year of occupancy by the plaintiff.

By Way of a Second Affirmative Defense Herein, This Defendant Alleges:

I.

That at the time of the commencement of these proceedings the plaintiff elected to condemn the premises herein described for "a term of years ending June 30, 1945, extendible for yearly [124] periods thereafter during the existing national emergency at the election of the United States of America, notice of which election shall be filed in the above entitled proceedings at least thirty days prior to the end of the term hereby taken or subsequent extensions thereof."

II.

That thereupon the plaintiff went into the possession of the premises described in the complaint and has occupied and continues to occupy the same.

III.

That more than thirty days prior to the 30th day of June, 1945, to-wit, on or about May 24, 1945, the said plaintiff elected to and did extend the term of its occupancy of said premises for the additional period of one year, commencing on the 1st day of July, 1945, and expiring on the 30th day of June, 1946.

IV.

That by means of the Second Amended Complaint on file herein plaintiff is now seeking and endeavoring to terminate its use and occupancy of the said premises on November 20, 1945, and is endeavoring thereby to revoke and render ineffectual its commitment to so use and occupy said premises to June 30, 1946. That having elected to extend the said term to June 30, 1946, plaintiff is now barred and estopped from establishing a lesser term therein without paying just compensation for the full period to which it has theretofore extended such term.

Wherefore, this defendant prays judgment:

1. That it be adjudged and decreed that plaintiff has taken the use and occupancy of the premises described in the complaint for the term commencing July 10, 1944, and expiring June 30, 1946. [125]

2. That plaintiff pay to this defendant $150,000.00 per year in monthly installments so long as plaintiff retains possession of that portion of the property sought to be condemned, which is the subject of the leasehold estate of this defendant, and to at least June 30, 1946, unless plaintiff retains possession beyond that time.

3. That it be adjudged and decreed that the co-defendants have not any right, title or claim in or to such award or compensation, except as to such portion of the premises not covered by the leasehold estate of this defendant.

4. For such other and further relief as the Court may deem proper in the premises, including costs of suit.

MacFARLANE, SCHAEFER
& HAUN,
JULIEN FRANCIS GOUX,

By /s/ RAYMOND HAUN,

Attorneys for Defendant,
Leo Lebenbaum.

[Endorsed]: Filed Nov. 6, 1945. [126]

[Title of District Court and Cause.]

STIPULATION RE PAYMENT OF PORTION OF AWARD AND ORDER FOR PAYMENT OF FUNDS ON DEPOSIT WITH THE REGISTRY OF THE COURT

Whereas, a Judgment and Decree in Condemnation was made and entered in the above entitled action on November 26, 1946, reference to which Judgment is hereby made for the particulars thereof, and the plaintiff in said action has deposited in the Registry of the Court just compensation required to be paid by said Interlocutory Judgment; and [127]

Whereas, by the terms of said Judgment the Court retained jurisdiction of said proceedings to determine the amount of the interests of all parties who had appeared in said proceeding in and to the compensation, which was ordered paid by the plain-

tiff in the above entitled action, the same as though a jury had rendered a verdict for the sum of $205,000 for all interests taken by the plaintiff in the within proceedings and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that the defendant Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him payment in the sum of $1,672.23; and

Whereas, subsequent to November 26, 1946, there have been hearings held by the above entitled Court in reference to the determination of the interests of the defendants Leo Lebenbaum, on the one hand, and Paul Gawzner and Irene Gawzner, on the other hand, as to said award; and

Whereas, in the course of said proceedings, to wit, on March 19, 1947, it was stipulated in open Court by and between said defendants Leo Lebenbaum, on the one hand, and Paul Gawzner and Irene Gawzner, on the other hand, as follows:

"It is stipulated that the portion of the award made by the Judgment of November 26, 1946, in the within cause that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of $91,296.00"; and

Whereas, following the making of said stipulation divers contentions were made by the said Leo Lebenbaum, one the one hand, and Paul Gawzner and Irene Gawzner, on the other hand, as to said sum of $91,296.00; and [128]

Whereas, said Leo Lebenbaum, on the other hand, and said Paul Gawzner and Irene Gawzner, on the other hand, have settled their differences in reference to that portion of said award allocated to the restoration, repair and replacement of the property condemned, both real and personal, to wit, the sum of $91,296.00:

Now, Therefore, It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, as follows:

1. That there may be paid out of the funds on deposit in the Registry of the Court from that portion of said Judgment allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid stipulation, to wit, out of the sum of $91,296.00 to Leo Lebenbaum the sum of $10,500.00.

2. That there may be paid out of the funds on deposit in the Registry of the Court from that portion of said Judgment allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid stipulation, to wit, out of the sum of $91,296.00 to Paul Gawzner and Irene Gawzner the sum of $80,796.00, being the balance of said sum of $91,296.00.

3. That upon the payments out of the Registry of the Court, as hereinabove provided, the said Leo Lebenbaum, on the other hand, and the said Paul Gawzner and Irene Gawzner, on the other hand, shall waive any further contentions in the above entitled action in reference to said sum of $91,296.00

allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid stipulation.

4. Upon the payment of the funds out of the Registry of the Court to the parties hereto, as provided by this stipulation, this stipulation shall be conclusive between the parties hereto as to their rights to that portion of the award made in the above entitled action allocated pursuant to stipulation of the parties hereto to the [129] restoration, repair and replacement of the property condemned in said action, both real and personal, to wit, to that portion of the award in the sum of $91,296.00, but shall be without prejudice to the rights of any of the parties hereto to assert and maintain in said above entitled action any and all claims which they have heretofore advanced or may hereafter advance in said litigation in reference to the remaining portion of said total award and the payment of the funds herein referred to or the acceptance thereof under the terms and conditions of this stipulation shall not operate to estop the parties, or either of them, to assert any rights for which they have heretofore or many hereafter contend as to the remaining portion of said total award, nor shall the payment of said funds herein provided for or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties to this stipulation as to said remaining portion of said total award.

5. That the above entitled Honorable Court

shall retain jurisdiction of the above entitled proceedings to determine the amount of the interests of all parties who have appeared in the within proceedings and who may hereafter appear herein, if any, in and to the compensation ordered to be paid by the plaintiff in the above entitled cause by the Interlocutory Judgment made and entered November 26, 1946, which remains after the payment of said sum of $91,296.00 to the parties hereto in accordance with the terms of this stipulation.

Dated this 5th day of June, 1947.

PAUL R. COTE and
THOS. H. HEARN,

By /s/ THOS. H. HEARN,

Attorneys for defendant,
Leo Lebenbaum. [130]

I expressly authorize and direct my attorneys Paul R. Cote and Thos. H. Hearn to execute the foregoing stipulation in my name and behalf.

Dated this 5th day of June, 1947.

/s/ LEO LEBENBAUM,
Defendant.

HILL, MORGAN & FARRER,

By /s/ STANLEY S. BURRILL,

Attorneys for the defendants,
Paul Gawzner and
Irene Gawzner.

We expressly authorize and direct our attorneys

Hill, Morgan & Farrer to execute the foregoing stipulation in our name and behalf.

Dated this 5th day of June, 1947.

/s/ PAUL GAWZNER,
/s/ IRENE GAWZNER,
Defendants.

ORDER

Upon reading and filing of the foregoing stipulation and good cause appearing therefor, It Is Hereby Ordered:

1. That the Clerk of the above entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited [131] in the above entitled action the sum of $10,500.00 to the defendant Leo Lebenbaum.

2. That the Clerk of the above entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited in the above entitled action the sum of $80,796.00 to the defendants Paul Gawzner and Irene Gawzner jointly.

3. That the sums paid out, as aforesaid, shall be received by said defendants as full compensation for the restoration, repair and replacement of the property condemned, both real and personal, in the above entitled cause.

4. That the Court shall retain jurisdiction of the within cause to determine the amount of the interests of all parties who have appeared in this proceeding and who may hereafter appear herein, if any, in and to the remaining portion of the

award, fixed by the Interlocutory Judgment and Decree in Condemnation made and entered herein on November 26, 1946, in the above entitled cause, after the payment out of the said sums hereinabove ordered to be paid.

Dated this 6 day of June, 1947.

/s/ JACOB WEINBERGER,
Judge.

Approved as to Form and Substance:

HILL, MORGAN & FARRER,
By /s/ STANLEY S. BURRILL,
Attorneys for Defendants,
Paul Gawzner and
Irene Gawzner.

PAUL R. COTI &
THOS. H. HEARN,
By /s/ THOS. H. HEARN,
Attorneys for Defendant,
Leo Lebenbaum.

/s/ IRENE GAWZNER,
/s/ PAUL GAWZNER,
/s/ LEO LEBEBAUM.

Judgment entered June 6, 1947.
Docketed June 6, 1947.

[Endorsed]: Filed June 6, 1947. [132]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

The original complaint in condemnation was filed July 10, 1944, seeking to acquire for the use of the Government, for a term of years, certain property located in the County of Santa Barbara, State of California. The premises consist of approximately twenty-one acres of land, the same being bounded on the North by U. S. Highway 101 and on the South by beach frontage on the Pacific Ocean. As of the date of filing of the complaint, the property was, and now is, owned by defendants Gawzner in fee, and defendant Leo Lebenbaum was, and is, the lessee of a portion of the premises containing hotel buildings and 250 feet of beach frontage, and furniture and furnishings, hotel equipment and other personal property on and in said premises. The land not under lease was reserved to the use of defendants Gawzner, and was, and is, improved by a garage building.

The issues involved herein have been of a complicated nature since the inception of the proceedings; many delays have occurred during the progress of the case [133] the first ensuing a year and a half after the filing of the complaint, upon the death of the learned Judge to whom the action was first assigned. Shortly thereafter the matter came to this department of the court, both lessor and lessee having filed substitutions of attorneys. This case has been given the attention, at different periods, of

several Special Assistants to the Attorney General and several Assistant United States Attorneys for this District. The original complaint has been amended, the third and last amended complaint having been filed the latter part of 1946. Setting dates for trial on the merits have been vacated for various reasons, the most predominant of which have been the likelihood of a compromise of some issue or phase of the matter; at one time a jury was impaneled, only to be excused a month lated; the final brief was filed and the case was submitted for decision in April of this year.

It is a source of regret to this court that an earlier decision has not been forthcoming; we are dictating these comments during the vacation period and after being continuously engaged for the past three months in the jury trial of a criminal matter. The pressure of official matters has prevented the rendition of our opinion prior to this date.

The lease between the defendants is dated December 15, 1943, and covers a period of five years from date, with option for renewal for an additional five years. Under the lease, the premises are to be used only for the purpose of carrying on the business of a hotel, and other activities usually attendant upon hotel operations; the rent is fixed at 35% of the gross business from rental of [134] cottages, rooms, etc.; 15% of the gross business from sale of liquors, etc.; 5% of the gross business from the sale of food, with a guaranteed minimum rental of $1500 per month. In Paragraph Five of

said lease, the lessors covenant to keep the roof, foundations, structural supports and outer walls of all buildings in good order and repair and properly painted, all other costs of upkeep, repair, replacement of the leased property including the care of lawns, shrubbery, etc., being the obligations of the lessee; by the provisions of the lease, the lessee is to deposit $20,000 in a bank, which fund is to be drawn upon by the parties for the purpose of making permanent improvements, which improvements are to become the property of the lessor. By Paragraph Seven of said lease, lessee is required to deposit monthly a sum equal to 3% of the gross business from rental of cottages, rooms, etc., and from the sale of liquors, etc., which fund is to be used for the replacement of furnishings, furniture and all personal property covered by the lease, provided the lessee is not required to deposit more than $3,000 per year in such fund. It is further stated in said last mentioned paragraph that it is the intention of the parties that said lessee shall maintain all of the furniture, etc., in the same condition as at the commencement of the term, and to that end, as any of said personal property shall, by use or otherwise be rendered unrepairable, the same shall be replaced from said fund so created, to the end that, upon the termination of the lease, said lessors shall receive back furniture, etc., of as good character and value as the same is at the commencement of this lease.

Paragraph Ten of the said lease contains certain provisions for termination of the lease upon the

happening of condemnation proceedings of the sort described in said paragraph. Paragraph Twelve of said lease contains a covenant against sub-letting, Paragraph Thirteen contains the lessee's covenant that he will surrender the premises at the termination of the lease or renewal thereof in as good order and condition as the same were in at the commencement of the term, reasonable use and wear thereof and damage by the elements excepted.

By the complaint filed July 10, 1944, the United States sought to take an estate in the premises described therein for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the existing national emergency, at the election of the United States of America, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon by the United States. The use stated in said complaint was that of a redistribution station and related military purposes.

Defendants Gawzner filed answer alleging that by virtue of the provisions of Paragraph Ten of the said lease the condemnation proceedings had worked a termination of the lease and that the entire amount of any award in such proceedings should be given to said defendants Gawzner, and further alleging the rental value of the premises sought to be condemned and covered by the lease to be $150,000 annually, and the rental value of the premises sought to be condemned and not covered

by the lease to be $10,000 annually, further alleging the highest and best use of the property to be for hotel purposes. [136]

Defendant Lebenbaum filed answer alleging that the entire award for the use of the property covered by lease should be paid to him, further alleging the value of such occupancy, together with compensation for damages occasioned by the use to be made to be $150,000 annually, and denying that the condemnation proceedings had worked a termination of the lease.

Pre-trial hearings were set, and by stipulation an amended complaint was filed, the answers on file being deemed the answers to the amended complaint; certain sums were deposited in the registry of the court by the United States, and by stipulation taxes against the property involved for the fiscal year 1944-1945, amounting to $1,594.02 were paid from said fund, said sum to be credited against the amount of the ultimate award decreed payable to defendants Gawzner.

Pre-trial briefs were filed in April of 1945 and in the brief filed by the then counsel for defendants Gawzner, it was first argued that the lease had been terminated as alleged in the answer of said defendants; it was further pointed out in said brief that the covenants in the lease demonstrate that the lease is not a lease in the accepted sense of being an absolute conveyance of real property wherein the owner retains only the reversion, but is more in the nature of a personal service contract or a license to use the premises and personal prop-

erty upon payment of the percentages and the performance of other conditions; that the factual situation created a complex problem to fix the method of valuation and a definition of value which would result in just compensation; it was further agreed in said brief that the value of the interests [137] of the owner and tenant should be separately fixed, but if the general rule of fixing but one value should be adopted, and upon the assumption that the tenant is entitled to share in the award, the definition of just compensation would be the highest price estimated in terms of money for the immediate use of the premises, furniture, fixtures and equipment, free of existing leases, for its highest and best use, if exposed for lease in the open market by an owner who is willing but not forced to lease, a reasonable time being allowed in which to find a tenant who is willing but not forced to rent, either acting under compulsion but each acting with full knowledge of all the elements affecting the value of the use of said property and for all the uses and purposes for which the property is adapted and of which it is capable, the tenant to keep the property in good repair, reasonable wear and tear excepted, the owner to keep the exterior in good repair, the owner to pay the amount reasonably required to procure from the existing tenant the immediate termination of the lease; that the use which was to be made of the property should be taken into consideration.

Counsel further stated in said brief that it was

the intention of defendants Gawzner to present experts on the question of value, upon the definition thereof ultimately adopted by the court, and to interrogate the witnesses on direct examination on the basis of their valuation. "It is anticipated," stated counsel, "that this line of questioning will result in the witnesses testifying that they gave consideration to the earnings of the property at and near the date of taking, and that, after investigation, they formed opinions of the earning [138] capacity of the property during the term of the use condemned. It is then proposed to develop in detail the figures. These statistics and opinions of anticipated earnings during the term condemned will not be introduced as in themselves fixing the valuation to be placed upon the use condemned in this proceeding but only to show on what basis and upon what exidence the experts relied in forming their ultimate valuation opinion. (Citing Brooklyn Eastern District Terminal v. City of New York, 139 F. 2d 1007, Monongahela Navigation Co. v. U. S., 148 U. S. 312, and James Poultry Company v. Nebraska, 284 N. W. 273.)

We are unable to locate in the voluminous files of this case any brief filed by the Government in April of 1945 which sets forth the Government's position as to the definition of value, but we presume this position was stated, either in open court or in some other manner, for we find, on page 1 in a brief filed by defendants Gawzner April 19, 1945, the following:

"The definition of value proposed by the govern-

ment in the case at bar, by which it is proposed to fix the entire compensation the government can be compelled to pay in this case is as follows:

"'By rental value is meant, . . . the highest price estimated in terms of money which the property would bring if exposed for lease in the open market by an owner who was willing but not forced to lease the said premises, a reasonable [139] time being allowed to find a tenant who was willing but not forced to rent the premises, and with both lessor and lessee acting with full knowledge of all the uses and purposes for which the property is adapted and of which it is capable.'"

In the brief filed by defendant Lebenbaum his then counsel argued that the lease had not been terminated, that the lessor was not entitled to any compensation for the use of the leased premises. In said brief counsel conceded the weight of authority to be that the taking of a portion of a leasehold interest does not absolve the tenant from his covenant to pay rent, and that the tenant remains liable for the full amount, notwithstanding the condemnation of a portion of the property for public use. Counsel observed in said brief, however, that since the rental under the lease provides for a percentage of gross receipts of the lessee "it may be that the Court in a final decision . . . and after the determination of the total rental to be paid by the Government will be required to apportion that sum between the lessors and the lessee under a formula which *which* express the sum to be paid by the Government in terms of anticipated gross re-

ceipts by the lessee and divide the award equitably, bearing in mind that the evidence will show that the operation of the premises by the lessee under the schedule of percentage rental fixed in the lease results in a profit to the lessee over and above the rents paid to the lessors." [140]

In June of 1945, the defendants jointly moved to strike the portion of the second amended complaint which provided that the condemnation sought should include the right to remove improvements placed thereon by the United States within a reasonable time after the expiration of the terms or extensions thereof, on the ground that the Government is without power to condemn the use of property for the purpose of removing improvements after the end of the specific term condemned. Thereafter on Sept. 19, 1945 a stipulation was filed wherein it was agreed between the plaintiff and all the defendants that any judgment entered in the proceedings should provide that the plaintiff should remove all improvements placed by it upon the property, and that the plaintiff should restore the property condemned, both real and personal, to the same condition as that in which it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, and that such removal, and restoration should be accomplished by the plaintiff during the term of the use taken, or within a reasonable time after the expiration of such term, and that the plaintiff should be permitted to remain in possession after such expiration for such reasonable time, provided the plaintiff should be re-

quired to pay to the parties legally entitled thereto rental at the rate fixed by the court in the above entitled action for the period of time after the expiration of such term as the plaintiff should remain in possession of the condemned property for the purpose of such removal or restoration.

On June 30, 1945, Judge Hollzer ruled upon the issue tendered by the answers of defendants Gawzner and Lebenbaum concerning termination of the lease, and decided [141] that said lease had not been terminated by reason of the condemnation proceedings herein and Paragraph Ten of said lease. Also in his opinion filed on said date, (reported at 61 F.S. 268), it was stated, in part:

"That is to say, so far as it presently disclosed, it is a part of the lessee's ownership of such estate which the sovereign is taking. While it may be that the evidence to be introduced at the trial will prove that the sovereign is also destroying or taking some of the rights of the owner of the fee, it is clear that upon the face of the pleadings the government is here seeking to substitute itself as occupant of the demised premises in place of the owner of the right of such occupancy. The owner of such right being the lessee, it is the latter 'who must be put in as good position pecuniarily as if his property had not been taken,' and this is to be done by paying to him the value of the interest taken."

In October of 1945 defendant Lebenbaum filed a motion to dismiss the proceedings as to defendants Gawzner on the ground that such defendants were

not entitled to participate in the condemnation trial, which motion was opposed by defendants Gawzner.

Also in October, the United States moved to file a second [142] amended complaint on the ground that the Secretary of War of the United States had determined that the use and occupancy of the premises beyond November 20, 1945 was unnecessary, and that such determination should be set forth in a second amended complaint. The Court allowed the filing of said complaint without prejudice to defendants' moving to strike the same. Defendant Lebenbaum answered said second amended complaint, and after setting forth matters similar to those in his answer previously filed, alleged that plaintiff having elected to extend its term to June 30, 1946 was barred and estopped from establishing a lesser term without payment of full compensation for the full period to which it had theretofore extended such term.

Defendants Gawzner moved to strike the second amended complaint based upon the ground of estoppel. On November 19, 1945, a stipulation was entered into between plaintiff and defendants which stipulation was headed: "Stipulation fixing terms and conditions for denial of motion to strike second amended complaint and order thereon." By said stipulation it was provided that the terms of the use and occupancy of the premises should be from the date of taking possession of the property, July 10, 1944, to and including November 20, 1945. That it was contemplated that plaintiff would be ob-

liged to retain possession of said property beyond November 20, 1945 for the purpose of estimating the cost of and restoring said property to its condition at the date when the plaintiff entered into possession, ordinary wear and tear excepted, and that the parties estimated the time needed for such purpose would extend to February 20, 1946, or to a later date.

That just compensation to the parties entitled thereto [143] should include payment at the same rate for the additional period between November 20, 1945 and February 20, 1946, irrespective of when the plaintiff should surrender possession, and should possession not be surrendered by February 20, 1946, rental at the same rate should be paid for the period following February 20, 1946 to the date when possession was surrendered. In consideration of such agreement, defendants agreed that they would accept and receive possession of said premises when tendered by plaintiff to them as completely restored, not waiving, however, any right defendants might have to claim such restoration was not complete.

That said stipulation further provided that should the parties subsequently agree upon a cash sum to be paid by plaintiff to the parties entitled thereto in lieu of restoration, and the parties should agree upon the length of time required for restoration, and such period extended beyond Feb. 20, 1946, then just compensation to the parties entitled thereto should include rental beyond February 20, 1946 for the full length of such estimated period at

the same rate as that fixed by the final judgment, computed on a monthly basis.

Defendants Gawzner then filed their answer to the second amended complaint, alleging much of the same matters as those contained in their previous answer, and stating that defendant Lebenbaum had not paid any rent, since the commencement of this action; alleging further that the premises had become permanently depreciated and damaged, and that the reasonable value of the use and occupation of the property, together with just compensation for the restoration thereof to its condition at the date of [144] taking, and for the permanent depreciation thereof was in excess of the sum of $200,000.

In December of 1946 defendant Lebenbaum filed a motion to exclude defendants Gawzner from participation in the proceedings, a motion for an order directing the plaintiff to deliver possession to defendant Lebenbaum upon the termination of its occupancy of said premises, and a motion for an order releasing from the funds theretofore deposited in the registry of the court a sum of money equal to the minimum rental payments due the defendants Gawzner under the terms of the lease, and for an order releasing from said deposited funds the sum of $15,000 payable to defendant Lebenbaum to be used in reopening the hotel.

Defendants Gawzner opposed the first two motions, and opposed the release of any funds to defendant Lebenbaum for use in reopening the hotel, all such opposition being upon the ground that the

lease had been terminated by the condemnation proceedings as contemplated in Paragraph Ten of said lease, and further that should the lease not be terminated, the right of Lebenbaum to share in the award could be determined only by evidence taken at a trial.

The case was, on March 20, 1946 assigned to this department and briefs were ordered filed concerning motions then pending.

In the brief filed by the United States, it was urged that if the lease was terminated, defendant Lebenbaum could not be heard on the issue of compensation at a trial of the matter; that if this court should adhere to the decision of Judge Hollzer that the lease had not been terminated, then defendant Lebenbaum, only, should be [145] heard on the issue of compensation for use of the leased premises, and the Government should be free to negotiate with him, if possible. It was also urged in the brief filed by the Government that the Court must decide which defendant would be entitled to the money for restoration of the premises, and that if the lease remained in effect, such restoration fund would be payable to the tenant.

Arguments were heard on these motions, and the matter was submitted for decision.

The matter had been set for June 5, 1946 for trial, and on April 5, 1946, a stipulation was entered into by the parties, wherein reference was had to a previous stipulation made in open court, and agreeing in effect that if the Court should adjudge that interest should be payable to the parties en-

titled to compensation for the use of the permises, no interest should be allowed on the monies on deposit in the registry of the court for the period commencing April 23, 1946 and ending with the date of rendition of judgment by the Court.

On April 30, 1946, this Court made its order denying the motion to exclude defendants Gawzner from the proceedings, and granting the motion of defendant Lebenbaum for an order that surrender of possession of the premises covered by the lease when made by the United States, should be made to defendant Lebenbaum, and denying the motion of defendant Lebenbaum to release funds on deposit, except that such motion was granted to the extent agreed upon by the parties in open court. In a Memorandum of Conclusions accompanying such order, we stated that we found no change from the facts considered by Judge Hollzer when he ruled that the lease was in effect notwithstanding the condemnation [146] proceedings, and in said memorandum we concluded that Paragraph Ten of the lease does not refer to condemnation proceedings such as are involved herein, and that the lease has not been affected by such proceedings, and that the Government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy.

On May 31, 1946, the parties entered into a stipulation wherein it was mentioned that the defendants had requested that the trial date of June 5, 1946 be vacated and that as a condition to the granting of such request had consented to waive

interest upon the monies heretofore deposited in the Registry of the Court for the period commencing June 5, 1946 and ending with the date of the commencement of actual trial.

On May 29, 1946, a stipulation was entered into between Lebenbaum as the only stipulating defendant, and the United States as plaintiff, wherein reference was made to the order of the court directing surrender of possession to the lessee upon conclusion of its occupancy of the leased premises. Such stipulation recited the tender by the Government, and the acceptance by the defendant Lebenbaum of all improvements, furniture, fixtures, etc., heretofore taken by the plaintiff except to the extent that restoration or replacement should be required by judgment herein; that the date of such tender and acceptance was 11:59 p.m. on May 31, 1946, and that the acceptance of such possession was without prejudice to the right of defendant Leo Lebenbaum to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the [147] time when plaintiff entered into possession, ordinary wear and tear excepted, and such compensation should include a sum equivalent to the rental which shall be finally fixed for the base period between July

10, 1944 and November 20, 1945, computed on a monthly basis, for an additional two (2) months period next following June 1, 1946, which additional sum should be paid as a part of the compensation for the restoration of the premises.

On June 10, 1946, a stipulation was entered into between the Gawzners as the only stipulating defendants, and the Government, wherein possession of the premises not covered by the lease was tendered to and accepted by, defendants Gawzner, except to the extent that restoration and or replacement might be required by judgment herein; that the acceptance of possession was without prejudice to the right of the defendants Gawzner "to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the time when plaintiff entered possession, ordinary wear and tear excepted, and shall include a sum equivalent to the rental which shall be finally fixed in this proceeding for the base period between July 10, 1944 and November 20, 1945, computed on a monthly basis, for an additional period next following the date of termination of tenancy equivalent to the time which shall subsequently be agreed upon or finally fixed and determined in this proceeding as the reasonable period necessarily required for such restoration."

The Court ordered the filing of pre-trial briefs. All parties by June of 1946 were appearing by different counsel than at the inception of the proceedings. [148]

In addition to filing numerous pre-trial briefs at the request of the Court, pre-trial proceedings which occupied approximately twelve days in open court were had, on various days during the period beginning June 18, 1946 and ending October 29, 1946.

The Government in its pre-trial brief filed June 18, 1946 took the position as far as the leased premises were concerned, that nothing had been taken from defendants Gawzner, and said defendants were not entitled to participate in the jury trial to fix the award for the use of those premises, and that the provisions of the lease calling for a percentage rental had no bearing upon this phase of the case. That defendants Gawzner likewise had no standing toward fixing the cost of restoration of the leased premises for the reason that the obligation of the tenant to restore did not mature until the end of the term. That the amount of compensation to be paid to defendant Lebenbaum consisted of (a) the market rental value of a sublease under Lebenbaum for a period commencing July 10, 1944 and ending May 31, 1946, and (b) the reasonable cost of restoration of any damage to the leased premises over and above reasonable wear and tear, together with sixty days' 'equivalent of rental, pursuant to the stipulation entered into between the Government and Lebenbaum.

That as to the portions not under lease the defendants Gawzner were entitled to compensation therefor, and Lebenbaum had no right to be heard concerning such compensation; that the measure

of such compensation would be the market rental value thereof for the term, together with reasonable cost of restoration if any portion of such property was damaged by the Government's use. [149]

Defendant Lebenbaum, in his brief filed June 18, 1946 reiterated his position that as to the leased premises defendants Gawzner had only the right to collect rent from Lebenbaum or terminate the lease, and that such right had not been changed by the condemnation proceedings; that the defendants Gawzner, having lost nothing by the temporary taking of the hotel property, are entitled to no award in these proceedings; that their rights rest in the personal covenant of defendant Lebenbaum to pay rent for the leased premises, which covenant remained in full force and effect throughout the occupancy by the Government. That under the lease the burden to repair all dilapidations of personal property covered by the lease as well as the interior of the buildings, and that Lebenbaum should be entitled to the award which would enable him to repair the dilapidations which occurred during the Government's occupation; that with reference to such burden, the remedy of defendants Gawner rests in their contractural rights against Lebenbaum which may be enforced against him if he should fail to discharge his duty.

In the brief of defendants Gawner filed June 28, 1946, counsel reiterated the contention of such defendants that the lease had been terminated. He stated that the landlord was entitled to participate in the proceedings fixing the compensation for the

use of the leased premises for the reasons that the lease fixed the rent to be paid on a percentage of gross business done, provided that the premises should be continuously used by the lessee only for the purpose of carrying on the business of a hotel, etc.; that the lease further provided that the furniture and furnishings should be maintained in good condition; by [150] virtue of the provisions just mentioned, the landlord's rental would be directly dependent upon the amount of business done, which in turn would depend upon the condition of the premises; that the Government not only occupied the premises, but in addition thereto eliminated any right of the tenant or any other person to operate a hotel in the premises and further the Government damaged the furniture and furnishings to some amount in excess of usual ordinary wear and tear.

Counsel for defendants Gawzner further agreed that this Court has the exclusive jurisdiction to determine the interests of all defendants in the award, and to try out the conflicting claims of the parties.

Counsel for Gawzners then observed, in said briefs, that the tenant's right to recover would be based upon the so-called "bonus value" theory, i.e., what would a purchaser in the open market have paid to the defendant Lebenbaum in dollars for the right to take over the lease during the period of the Government's occupancy and continue to pay to the landlord all of the rent reserved by the lease.

During July of 1946 the Court viewed the premises involved. Thereafter counsel were directed to exchange information with reference to restoration costs. At a hearing on September 9, 1946, counsel for the Government reported that he had received copies of restoration costs as estimated by defendants Gawzner, and an estimate by defendants Lebenbaum, and that such estimates were widely divergent. Counsel for the Government stated that defendants Gawzner took the position that restoration covering inherent depreciation and normal use should be made, in addition to [151] the payment of rent; that it was the position of the Government that any rental paid should include payment for ordinary wear and tear, and restoration costs should be only those for use resulting in more than ordinary wear and tear. Counsel for defendants Gawzner agreed in the statement of counsel for the Government as to the respective positions taken, and mentioned that certain repairs to the exterior would have to be made; that the appraiser engaged by the lessor was not instructed to allow for ordinary wear and tear, but to ascertain the damage done and the cost of rehabilitation. It was suggested by counsel that it would be difficult to ascertain the condition of the personal property at the date of entry by the Government so that the cost of restoring it to the condition to which it should be found after ordinary wear and tear had ensued could be estimated. Counsel for defendants Gawzner then pointed out that under the terms of the lease the equipment was to be

maintained in the same condition in which it was when the lessee took over. Counsel for the Government then stated that the Government did not undertake such an obligation, to which counsel for defendants Gawzner observed that if the Government paid only a portion of the cost of restoration, a complication in the apportionment between the tenant and the landlord would result.

Counsel for Mr. Lebenbaum stated that the lessee had been unable to arrive at a reliable figure because market prices had increased and materials were difficult to obtain. That the lessee took the position that the only manner in which the difficulty could be solved would be to proceed with the restoration, and thus ascertain what it would cost. That the problem was then presented as to [152] what portion of the cost of each article should be borne by the Government.

Counsel for the lessee conceded that the Government was correct in its position that ordinary wear and tear should be included in the rent, then mentioned that under the lease Mr. Lebenbaum is obligated to repair ordinary wear and tear, so that the obligation of the lessee to the landlord is rent, plus restoration, plus any other dilapidation.

Counsel for the lessee further stated that in his opinion the question should be submitted to the jury on the basis of what is the rental value to a tenant who has not the burden of restoring ordinary wear and tear.

Counsel for the lessor stated that in his opinion

the easiest method would be to agree upon a restoration cost and exclude from the issue going to the jury any ordinary wear and tear, and submit to the jury the question of a flat rental, with the understanding that the Government has restored.

Counsel for the Government conceded that the property was put to a greater use than ordinary use, and suggested that the matter be continued, and that the parties would endeavor to come to some agreement concerning what the restoration cost would be to a tenant using the property for hotel purposes, and occasioning ordinary wear and tear. He then added that some of the damage had been occasioned by the refusal of the landlord to approve repairs and the issue would arise as to whether or not the Government was responsible for damage caused by the failure of the landlord to repair or to approve the making of repairs by the tenant. [153]

Counsel for the lessee then questioned whether the refusal of the landlord to make exterior repairs relieved the Government from the obligation to pay the lessee for damage occasioned to the interior by such need for exterior repairs.

The Court then requested that counsel disclose to each other the evidence they intended to offer at the trial, so that each could determine the objections he intended to offer, if any, to such evidence, to the end that if possible, the legal questions might be argued prior to calling the jury.

Here we shall review some of the points advanced by the Government in its brief on legal issues to

be tried filed September 27, 1946, and which the Government tendered as applicable to that portion of the trial in which the Government's obligation would be determined:

1. Compensation may be fixed only on the basis of the reasonable rental value of a single term of 25⅔ months for the letting of the entire premises with the exclusive right to use and occupy such premises and the furniture and fixtures therein, having regard for the uses for which they were then available, and for which there was a market, actual or potential, on July 10, 1944, including the highest and best marketable use, as such rental would have been fixed on that date in negotiations between a willing lessee and sublessee.

2. Consideration of the use to which the property was actually put should be excluded, as same was a non-marketable use.

3. Witnesses must testify separately as to compensation for rent and as to damages for restoration. [154]

4. The compensation provisions of the lease are not relevant to prove the cash rental value of the Government's use and occupancy.

5. The contingent percentage terms of the lease may not be brought out on the direct or cross-examination of any witness.

6. The net profit or loss received or sustained by the lessor or lessee during the operation of the property before it was delivered to the Government is not relevant.

7. No stipulations of the parties, or any other

action of the Government have extended or increased the obligation of the United States to pay damages for restoration over and above what would otherwise be its legal obligation under the Fifth Amendment.

8. The United States has no greater or different obligation to pay restoration damages than would have been the obligation of a private individual who had leased the furnished hotel for a 25⅔ month period without any express covenant as to restoration.

In a joint brief filed by all defendants on October 8, 1946, the defendants contended that the Government was obligated to do actual restoration of the property under its stipulations and having failed to restore the property, defendants were entitled to damages for such breach of contract to the present full cost of such restoration;

That because the second amended complaint sought to condemn a use for a period from July 10, 1944 to November 20, 1945, no evidence of a use for a longer period could be submitted to the jury; [155]

That compensation to be recovered by the defendants should be the reasonable value of the use of the premises for all purposes reasonable forseeable under the uses for which the premises were sought, i.e., the establishment of a redistribution station related to military purposes;

That evidence of the actual revenue of the property involved before and after taking of the rights condemned by the Government should be admis-

sible; also the cost of operation an dmaintenance of the property; the value of the improvements damaged or destroyed by the Government; the opinion of experts as to the market value of the temporary use, i.e., for a redistribution station and related military purposes; the reasonably foreseeable consequences to the property resulting from its use by the Government for a redistribution station and related military purposes as sought by the Second Amended Complaint; that the terms of the lease should be admitted in evidence both to show the interests of the parties and for all purposes.

At a pre-trial hearing on October 14, 1946, counsel for all defendants conceded that the United States had exercised its option to try the case as against all defendants, under the provisions of Section 1246.1 of the Code of Civil Procedure of the State of California, and that counsel for defendants Gawzner stated it was his understanding of the law that the defendants must join and submit the total value of all their interests to the jury as a unit; counsel for the United States agreed and stated that the jury, during the trial, should not have brought before it the conflicting positions taken by the defendants as to their separate interests; counsel for [156] defendant Lebenbaum stated it was his understanding that the two defendants would join as to the just compensation to be awarded to them as a group, that any question of allocation of the award as between them should not arise before the jury; that, after that

should be determined, the Court, without a jury, would determine the allocation or division as between the Gawzners and defendant Lebenbaum; counsel further urged that this Court had no jurisdiction, in any proceeding, to determine the question of rent as between the defendants.

It was also stipulated at said pre-trial hearing that the period to be referred to at the trial as that for which valuation would be fixed, should be the period from July 10, 1944 to November 20, 1945, as described in the second amended complaint.

On October 17, 1946, there was presented by counsel the question as to whether the Government had the legal right to condemn personal property for a temporary use; further argument also occurred as to whether the United States was bound by the stipulation signed by its counsel and counsel for the defendants September 9, 1945 and November 19, 1945, as those stipulations refer to restoration; counsel for the Government contended that if those stipulations purported to agree that the Government would pay higher compensation in the form of restoration than that demanded by the Fifth Amendment, the United States was not bound.

Counsel for defendants Gawzner stated his position with reference to the matter was that defendants were entitled to treat the compensation that the Government must pay on the basis of what the rental would be by the [157] long-term tenant against the short-term occupier; that the terms of

the lease were material and pertinent for the reason that under the terms of the lease the premises must be maintained by Mr. Lebenbaum, and Mr. Lebenbaum would have kept such obligation in mind when negotiating for the lease for a short term out of his long-term lease and fix his rent accordingly.

Counsel for defendants then observed that unless the stipulations were set aside, defendants would not raise an objection concerning the right of the Government to condemn the temporary use of the personal property.

Counsel for the United States observed that the attorney who signed the stipulation on behalf of the Government had only the authority given the Government under the Fifth Amendment.

Counsel for defendant Lebenbaum stated that the obligation of the Government under the Fifth Amendment would be to pay to the condemnee the difference in value between the property as it was at the time of the taking and as it was at the time of the return that the obligation of the Government under the stipulations was to do the actual work of restoration. That the obligation to do the actual work of restoration, imposes upon the Government a different type of obligation than the obligation to pay for the restoration; a different type of procedure, and a different measure of recovery for the defendants.

Counsel for defendant Lebenbaum then proposed that the matter be submitted to the jury under

instructions that the rent should not include ordinary wear and tear, but the recovery for restoration should include ordinary wear and tear. [158]

Counsel for the Government stated that he could not accept that statement for the reason that he could not conceive how expert evidence could be introduced concerning furnished property without the rent including ordinary wear and tear; that the Government had continued in possession endeavoring to determine what would be required for restoration, when defendant lessee petitioned the Court that the Government is divested of possession, and such possession returned to him; that possession had been returned to the lessee, and that both the lessee and the lessor had started the work of restoration; that upon being tendered possession, and under such circumstance, defendant lessee modified his previous statement, and reserved the right to claim in damages the equivalent of the cost of restoration.

Counsel for defendants Gawzner stated that if the Government could not be bound by the stipulations entered into by its counsel concerning restoration, such counsel would be obliged to revise his theory as to offering proof of rental value of the property as a hotel, and that the evidence would then be offered on the basis of consideration of the actual use.

A discussion ensued as to whether defendants Gawzner would be bound by the stipulation made by the Government and defendant Lebenbaum providing that two months should be the period of

restoration; counsel for the Government stated that it was his understanding that at the trial the Court would direct that in addition to the rental as fixed and in addition to restoration as fixed, there would be included an additional sum for the period running from November 20, 1945 to June 1, 1946, [159] at the same monthly rental.

In a brief filed October 18, 1946, counsel for the United States reiterated in writing certain concessions made in open court with reference to the admission of evidence at the trial, and in effect stated that while in his opinion the general rule is in condemnation cases that if there is a market, evidence in respect to profits and factors out of which profits are derived is not admissible, but that due to the peculiar circumstances of the present case wherein it appears that such market evidence as is available is derived out of transactions involving this particular property and other leases upon the basis of sharing the profits of the operations of the hotels and, in view of the fact that the defendants were willing that such factors be received in evidence, the Government would not object to such being made the rule in this particular case, provided such evidence would cover a business cycle of not less than five years.

On October 18, 1946, at a further pre-trial hearing, counsel for the Government announced that the Government would be bound by the stipulations its counsel had signed; counsel for defendants Gawzner inquired when the Government intended to do the restoration it had agreed upon, to which

counsel for the Government replied that it was his view that the stipulation entered into between the Government and the lessee relieved the Government of performing the actual restoration, and that there remained instead the liability to pay for the equivalent of restoration; counsel for defendants Gawzner then pointed out that defendants Gawzner had not joined, and had not been asked to join in the stipulation, that such stipulation provided for two months [160] as the period for restoration, and equivalent rental therefor, whereas the defendants Gawzner had entered into a stipulation with the Government wherein three months was designated for the period of restoration, and equivalent rental therefor. Counsel for defendants Gawzner then announced that he would be bound by the stipulation providing for the two months period during the trial before the jury, but that he would not be bound by such stipulation when the Court proceeded to divide the award. Whereupon, counsel for defendants Gawzner stipulated with counsel for defendant Lebenbaum that as against the Government defendants Gawzner would be bound by the stipulation that two months rent might be paid as considered to be for the time required for restoration, and that defendants Gawzner would not be bound by such stipulation as against defendant Lebenbaum.

The question then arose as to whether the jury would be asked to fix the rent for the period stated in the second amended complaint, to-wit: from July 10, 1944 to November 20, 1945, and the Court should add to the judgment an additional two months rent at a monthly rate to be computed, or whether the jury should make such computation. Counsel for defendants Gawzner observed that if the jury were to make the compensation, the complaint should be amended to include the two months period, whereupon counsel for the Government stated that he would endeavor to secure permission to amend the complaint accordingly.

The Court then stated that it was of the opinion that the Court should know for its own information what part of the award would be considered as restoration and what part as rent. Counsel for the Government pointed out [161] that the fixing of damages for restoration should cover only the period up to the time the Government actually turned the property back; that in such regard the jury should be told that the jury should not consider the fact that the Government was paying rent for a longer period than it occupied the premises.

The Court then requested that all counsel submit by October 21, 1946, questions proposed to be asked of the experts as to rental value and on the questions of restoration. All counsel demurred to the request, stating they would be unable to formulate such questions in advance; counsel for defendants insisted they intended to ask the experts to take into consideration the terms of the lease in con-

sidering what a long-term tenant would charge a short-term occupier; counsel for the Government replied that he considered the lease not to be a measure of the award, as such, and thus not admissible.

At the close of the pre-trial hearing held on October 14, 1946, counsel for the Government and counsel for defendants Gawzner were in agreement upon the following statement of counsel for defendants Gawzner:

"As I understand it, the Government in giving testimony as to restoration is to go in upon the theory that all damage that was done over and above what would have been done for hotel purposes will go in under restoration and that the value of the use will go in under the theory that it was to be used for hotel purposes." [162]

Counsel for defendant Lebenbaum stated that he agreed, except that the evidence bearing on the question of restoration, in view of the obligation of the Government as set forth in the stipulation should be given on the basis of the cost at the date of trial of making restoration and not on the basis of the difference in value of the furniture at the time it was taken and the time it was returned.

On Monday, October 21, 1946, counsel for the Government, at a further pre-trial hearing announced that he intended to ask leave to amend the second amended complaint to change the term of occupancy from that fixed in said complaint, to-wit: July 10, 1944 to November 20, 1945, to a term the

equivalent of the Government's actual occupancy, from July 10, 1944 to June 1, 1946. Counsel for all defendants announced their objections to such amendment; counsel for defendants Gawzner pointed out that the operation of a hotel of the type involved is more or less seasonal; that the inclusion of the period from November 20, 1945 to June 1, 1946 in the term of occupancy would change the presentation of evidence, for the reason that defendant Lebenbaum would ask a different figure of rental for a lease that would be for one winter and two summer months, than he would for a lease for two full years. That though the Government did remain in possession for the period indicated, it had agreed or indicated it would vacate in November and it would have been more advantageous to the property owner to have the premises returned in the winter than in the summer.

Counsel for the Government then moved to file his third amended complaint; counsel for defendants objected [163] on the ground that the Government was concluded by its stipulation of November 19, 1945 fixing the term of occupancy as from July 10, 1944 to November 20, 1945.

It was then agreed between counsel for defendants that during the trial before the jury when either spoke, he would speak for both defendants unless he otherwise indicated.

On October 21, 1946, pursuant to order of court, the Government's third amended complaint was filed.

On October 23, 1946, a jury was impaneled, and temporarily excused while counsel continued further discussion. It was agreed that the term of occupancy for which the premises were condemned would be designated as 23⅔ months, and that the two months restoration period would be excluded from the term, and when the rental would be finally fixed, a monthly rate would be computed, and twice the monthly rate would be added to the award for restoration.

The Court then asked counsel for defendants regarding whether its previous understanding was correct, to-wit: that one counsel when making an objection or stipulation would speak for all defendants during the trial before the jury, whereupon counsel for defendant Lebenbaum stated that there would be matters on which the defendants would be in opposition during the trial, evidence to which defendants Gawzner might not offer objection and to which defendant Lebenbaum's counsel might wish to object on behalf of such defendant and vice versa; counsel for defendants Gawzner signified his agreement with such statement and added that in view of a conference just had in chambers, he felt that counsel for defendants [164] would be very much at odds, and that defendants Gawzner refused to be concluded by any stipulation made by Mr. Lebenbaum concerning restoration. (At the conference referred to, Government counsel had disclosed to the Court, for the first time, that such counsel contended that defendant Leben-

baum had entered into a series of contracts on February 12, 1946 with the Government whereby said defendant had fixed, item by item, what he consented would be restoration.)

In the ensuing discussion in open court, Government counsel contended that at the trial defendant Lebenbaum would be limited to his stipulations with the Government as to damages for restoration; said counsel also stated that he understood that counsel for defendants had agreed to a joint presentation of the evidence, but that under the circumstances, if a joint presentation were not to be made, the Government would request that the Court determine what compensable interests were taken from defendants Gawzner, and what compensable interests were taken from defendant Lebenbaum.

Counsel for defendants Gawzner then observed that defendant Lebenbaum by stipulation had sought to deprive defendants Gawzner of certain of their rights; that defendants Gawzner had made a stipulation with the Government that the latter would restore the premises, and that the type of restoration upon which Mr. Lebenbaum agreed with the Government; that the figures on costs of restoration as computed by defendants Gawzner approximated the sum of $80,000, while those agreed upon between defendant Lebenbaum and the Government totalled less than $20,000. [165]

Counsel for the Government then argued that defendants Gawzner were not entitled to be heard concerning the cost of restoration, and that defendant Lebenbaum was entitled to waive restora-

tion from the Government if he so desired; counsel for defendants Gawzner pointed out that defendants Gawzner also had a contract with the Government, in which the Government stipulated it would restore the premises.

Counsel for defendant Lebenbaum argued that though the list of restoration items which Government counsel had characterized as stipulations had been signed by defendant Lebenbaum, such defendant intended to object to their introduction unless it were proven that the official who signed them on behalf of the Government had express authority so to do; further that any agreement thereby made had been breached by the Government.

At the close of the hearing of October 23, 1946, each counsel for defendants stated that each would insist on being heard during the trial on behalf of his client or clients, and that defendants would not be able to join in presenting testimony; whereupon all counsel agreed their respective positions had been changed with reference to the presentation of evidence at the trial.

On October 24, 1946, arguments between counsel concerning the effect upon the proceedings of the alleged agreements between defendant Lebenbaum and the plaintiff; counsel agreed that the presentation of evidence to the jury should be delayed until the matter should be determined.

On October 25, 1946, counsel announced that negotiations for settlement as to the amount of the award [166] were in progress; on October 28,

1946, counsel for defendants Gawzner announced that a joint offer had been made by all the defendants to the Government for a specified sum of money in complete settlement of the litigation involved herein so far as the Government is concerned, the sum so agreed upon to be treated as between the defendants themselves as a verdict of a jury, so that the question would be left open as between the defendants, but that the offer had not as yet been accepted, that all counsel had hopes that a settlement would ultimately be made.

The Court then suggested that counsel complete the presentation of all matters upon which a ruling of the Court was desired prior to trial. Further discussion and argument were had, at the conclusion of which counsel for defendants Gawzner announced that in view of the position taken by the plaintiff with reference to so-called agreements between plaintiff and defendant Lebenbaum, counsel felt that he was entitled to reverse his previous position and to insist that the Government be bound by its agreement with defendants Gawzner with reference to the three months period, rather than the two months period, as concerned restoration.

On October 29, 1946, by agreement of counsel, the jury was excused until November 26, 1946, prior to which time it was dismissed.

On November 26, 1946, plaintiff and defendants entered into a stipulation for judgment, which is in part as follows:

"Whereas the above entitled and numbered proceeding has been instituted by plaintiff to determine the just compensation to be [167] paid by it for the condemnation and taking by plaintiff of the estate or interest in the property hereinafter described, together with the damages arising through its obligation to make certain restoration to said property. . . .

"Whereas the stipulating parties have agreed upon the compensation to be paid by the plaintiff for such condemnation and taking and such damages as aforesaid. . . .

"(b) That the sum of $205,000 without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, [168] reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration. . . ."

Said stipulation further recited that although the Government took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant Leo Lebenbaum was

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On October 29, 1946, by agreement of counsel, the jury was excused until November 26, 1946, prior to which time it was dismissed.

On November 26, 1946, plaintiff and defendants entered into a stipulation for judgment, which is in part as follows:

"Whereas the above entitled and numbered proceeding has been instituted by plaintiff to determine the just compensation to be [167] paid by it for the condemnation and taking by plaintiff of the estate or interest in the property hereinafter described, together with the damages arising through its obligation to make certain restoration to said property. . . .

"Whereas the stipulating parties have agreed upon the compensation to be paid by the plaintiff for such condemnation and taking and such damages as aforesaid. . . .

"(b) That the sum of $205,000 without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, [168] reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration. . . ."

Said stipulation further recited that although the Government took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant Leo Lebenbaum was

permitted to operate said premises until July 15, 1944 in consideration of his agreement to pay the United States of America the sum of $1,672.23, which sum was to be credited in favor of the United States upon any obligation thereof to pay compensation for the taking of said premises; that such total credits, including the sum on deposit, amount to $75,365.78, the judgment should provide that the sum of $129,634.22 be paid by plaintiff into the registry; the stipulation further provided that the right reserved by plaintiff to remove any improvements within a reasonable time after July 1, 1946 as reserved in its third amended complaint was thereby surrendered in favor of whomsoever the Court should find and determine is "the legal owner of such premises."

The stipulation further provided:

"That if competent witnesses were sworn and testified, their testimony would be that the sum of $205,000, without interest, together with the surrender of plaintiff's right to remove improvements and structures placed upon said premises by it and the vesting of title thereto in the legal owner of said premises, constitutes fair, just [169] and adequate compensation to be paid by plaintiff to the parties entitled thereto for the taking of the estate and interest described in Paragraph III in the real and personal property hereinafter described in Paragraph V, together with full satisfaction of all damages which have accrued, or will accrue, by reason of the plaintiff's failure to make restoration, . . .

"That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of $205,000 without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that defendant, Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of $1,672.23." [170]

The judgment followed the wording of the stipulation.

Shortly after the filing of the stipulation and judgment this Court requested counsel for the defendants to file briefs stating their respective positions with reference to the division of the award.

In his brief filed January 2, 1947, counsel for defendants Gawzner again urged that the condemnation proceedings effected a termination of the lease under Paragraph Ten thereof; that if the lease were not cancelled, then, still under the provisions of the lease defendant Lebenbaum had assigned any interest in the award to defendants Gawzner.

Counsel further urged that if defendant Lebenbaum should be entitled to share in the award for

the use of the premises, as distinguished from the restoration, then the measuring rod should be the bonus value, if any, of his lease; that a lessee could not, when the Court apportions an award, recover for loss of profits; that the defendants Gawzner were entitled to the portion of the award covering restoration of the property, even though the lease requires the tenant to maintain the interior of the hotel, and in this connection, counsel pointed out that though defendant Lebenbaum had been in possession of the hotel for six months after the Government's use had terminated, restoration had been made only in part; that if it should be determined that defendant Lebenbaum should share in the part of the award devoted to restoration, then he should not be entitled to any of the restoration costs waived by him under the so-called stipulations with the Government dated February 12, 1946. [171] Counsel in his brief pointed out that though the Court had not ruled on whether the said documents were binding upon defendant Lebenbaum, but, quoting counsel: "We do not hesitate to say that the existence of these documents played no small part in inducing the defendants Gawzner to accept the settlement figure reached with the Government." In connection with the statement just quoted, counsel observed, "There can be no apportionment of a fund that was not recoverable from the condemnor."

Counsel for defendants Gawzner then mentioned seven items which in his opinion the Court should determine, and among which items the total award

should be divided, i.e., value of use of premises not covered by the lease; value of use of premises covered by the lease; what portions of the value last mentioned should be awarded to lessee and lessors respectively; that total award for restoration of the premises; the portion of the award for restoration which should be allocated to the exterior of the leased premises for which the defendant Lebenbaum has no obligation to maintain; the portion of such award for restoration which should be allocated to the interior of the leased premises which defendant Lebenbaum has an obligation to maintain; the portion of the sum so allocated for the restoration of the interior that the defendant Lebenbaum is entitled to receive.

In defendant Lebenbaum's brief filed January 3, 1947, it was conceded that defendants Gawzner were entitled to recover the rental for the lands not covered by the lease; that defendants Gawzner were entitled to recover the cost of restoration, or rehabilitation of any portions of the exterior of the buildings or any other parts of the property [172] for whose maintenance the Gawzners are liable under the lease; or which suffered destruction by undue or careless usage by the Government; that defendant Lebenbaum should receive that portion of the award representing compensation for the use and occupancy of the leased premises; also, that portion of the award representing compensation for restoration and rehabilitation of the interior of the buildings and of the furniture, furnishings and equipment for the reason that "by his covenant

contained in the lease there is imposed upon him the obligation to do the work and pay the cost of such rehabilitation and restoration, and for the further reason that the property would be untenantable as a resort hotel, and Lebenbaum's lease would thus be rendered useless, if he did not so rehabilitate and restore. He could not compel the defendants Gawzner to do the said interior work of rehabilitation and restoration, yet he would still remain liable in full for the rent under the lease. . . ."

Counsel for defendant Lebenbaum then pointed out that there existed no controversy between defendants concerning the payment of rent; that defendant Lebenbaum concedes his obligation to pay rent was unimpaired by the condemnation proceedings, but that defendants Gawzner persistently maintained that the lease had been terminated and had refused to accept rent tendered them. Counsel cited Pasadena v. Porter, 201 Cal. 381; 257 Pac. 526; Gluck v. Baltimore, 32 Atl. 515, 81 Md. 315; John Hancock, etc. Insurance Company v. U. S., 155 Fed. 2nd 977; U. S. v. General Motors Corp., 323 U. S. 373, as authority for his contention that where the obligation to pay rent under the lease continues, the recovery of the tenant is not [173] limited to bonus value, and that the lessee is entitled to the fair rental value of the leased premises, undiminished by the rental under the lease.

On January 17, 1947, the first of a series of pretrial hearings as to the issues between the several defendants was had. At said hearing, the Court

announced it was of the tentative opinion that, if possible, the lease should be followed as closely as practicable in the division of the money, and suggested that the award of $205,000 should be separated into the following different elements: What amount was contemplated in the award as compensation for exterior improvements and other items for which the landlord is responsible? What amount may be estimated or contemplated for restoration of destroyed property, for repair of damaged property, for renovations as to the interior of the premises? What amount should be apportioned for premises exclusively owned by the landlord and not within the leased premises? What amount should be apportioned for use and occupancy?

Counsel for defendant Lebenbaum pointed out that after segregating the amount due the landlord for lands lying outside the lease, and the portion necessary for exterior restoration, the lessee should receive the remainder of the award, including the portion necessary for restoration of the interior of the buildings, the furniture and furnishings. As to the remainder of the award, counsel for defendant Lebenbaum maintained that the Court had no jurisdiction to divide such fund, in that the controversy as to the ownership of such fund presented no Federal question and there existed no diversity of citizenship between the defendants; that any [174] decision the Court might make which purported to segregate a portion of the fund and pay the same to the defendants Gawzner as rent would not be

res judicata upon the personal covenants of Lebenbaum to pay rent.

Counsel for defendants Gawzner replied that the Court had acquired jurisdiction under the condemnation proceedings, and therefore had jurisdiction to decide conflicting claims to the fund regardless of the citizenship of the claimants, citing Oliver v. U. S., 156 F. (2d) 281; that defendants Gawzner should receive the entire award, but that if the Court should rule against such contention, then the Court should divide the award between the parties; that all of the fund for all of the restoration should be paid to defendants Gawzner, or should be impounded for restoration purposes.

Counsel for defendants Gawzner further pointed out that the Government was in the same position that a person would have been had such person sublet the property; that such person would have been obligated to pay the landlord the same rents payable under the lease; that the Government had paid what a lessee would have paid for the premises during the period of time involved; that the very least a tenant could expect to pay the landlord would be $60,000 a year, considering the amount which defendant Lebenbaum had paid defendants Gawzner for the six months during which the premises were operated under the lease; that such figure was the minimum, because the six months in question were the six "lean" months of the year.

The Court then inquired if counsel had been able to arrive at any estimate concerning the amount necessary for restoration; counsel for defendant

Lebenbaum [175] replied that the maximum estimated by his client was $60,000, and counsel for defendants Gawzner replied that the amount estimated by his client was over $80,000.

Counsel for defendant Lebenbaum then observed that a difficult problem was presented in the question of what is the difference between extraordinary and ordinary wear and tear, and that he knew of no means whereby such difference could be shown by evidence; that as to the division of the fund after restoration costs had been ascertained, it would be reasonable to assume that had the operation of the hotel continued, the parties would each have made the amount of profits each received before Government occupancy, and that the record of such six months operation might provide an equitable basis for allocation or distribution of the fund.

On February 28, 1947, a further pre-trial hearing was held; the Court inquired of counsel if their clients had been able to come to any agreement concerning restoration costs and was informed that counsel felt they were far apart in their negotiations and could reach no basis upon which further negotiations might be predicated; the Court then asked if counsel would produce evidence to show the value of the property which had been totally destroyed, if any, during the occupancy of the Government; also, evidence as to the amount for decorating of the inside, and for painting on the outside; also, what amount would be necessary for

replacing wornout articles; the Court also inquired if counsel had arrived at any figures on the items mentioned which served as a basis for the amount accepted in settlement; counsel for defendants Gawzner replied that there would be no way of telling what portion [176] of the amount paid in settlement was based upon restoration and what portion upon rent, because the figure was arrived at for the purpose of compromising a piece of litigation in which both the amount of restoration was disputed, and the amount of rental was disputed. That no segregation of these respective amounts was made.

It was then mentioned by counsel for defendant Lebenbaum that said defendant had expended $17,000 for restoration since taking possession of the premises; counsel for defendants Gawzner stated there would be a dispute concerning whether all of this amount had been spent for restoration.

On March 18, 1947, counsel for defendants Gawzner moved that the trial concerning the apportionment of the award between the defendants be placed off calendar, for that the reason that no pleadings were on file which raised the issues between the respective defendants, in that none of the defendants had filed an answer to the plaintiff's third amended complaint, and stated that this fact had escaped counsel's notice; an answer on behalf of defendants Gawzner, and a cross-compalint was proffered by counsel for said defendants, and marked "Lodged." Counsel for defendant Leben-

baum objected to the filing of the cross-complaint on the ground that it contained allegations concerning matters occurring after the Government had terminated its occupancy, and that it contained certain matters not properly before the Court in the condemnation proceeding.

After argument, the Court allowed the filing of the answer of defendants Gawzner to the third amended complaint, and ruled that certain allegations in the cross-complaint [177] might remain on file to be considered as part of the answer, but that the motion to file the cross-complaint as such was denied except as to those portions which were to be considered part of the answer. The motion to vacate the date for trial was denied.

It was then stipulated, and the Court so ruled, that the answer of defendant Lebenbaum to the second amended complaint might be deemed his answer to the third amended complaint.

Whereupon trial as to issues between the defendants proceeded. There was introduced in evidence by defendants Gawzner, upon stipulation of counsel, the lease involved herein; a notice of termination of lease, dated August 4, 1944, signed by defendants Gawzner, stipulated to have been served upon defendant Lebenbaum on August 11, 1944, was received in evidence over the objection of defendant Lebenbaum.

Counsel for defendants Gawzner then made formal motion that the Court make an order directing payment of all of the funds on deposit in the registry of the Court to the defendants Gawzner

on the ground that the institution of the condemnation proceeding and the giving of the notice of termination operated as a cancellation of the lease. The motion was denied.

The following stipulation was then made in open court by counsel for the defendants:

"It is stipulated that the portion of the award made by the judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property [178] condemned, both real and personal, is the sum of $91,-296.00."

Counsel for defendants Gawzner then read into the record an account of items of restoration and replacement, the estimated cost of which made up the $91,296.00, whereupon both counsel agreed that there would be a dispute as to whether certain amounts already spent by their respective clients could be chargeable to the sum mentioned. Both counsel stated that they agreed with the Court that evidence should be introduced concerning the sums already spent by their respective clients on restoration.

On March 19, 20 and 21, 1947, the trial continued; the testimony of two experts was offered by defendants Gawzner, and the following question was asked of the first witness R. E. Allen:

". . . will you please assume, first that the lease, of December 15, 1943, defendants Gawzners' Exhibit No. 1, was in existence on July 10, 1944, and was then in full force and effect and that Mr. Lebenbaum was occupying the premises; second, that

Mr. Lebenbaum had the right to assign or sublet the premises for a period from July 10, 1944 to June 1, 1946, or that the lessors would consent to such an assignment or subletting; third, that the assignee or sublessee would either maintain the premises in their then condition during the period of occupancy or would, upon termination [179] of the occupancy, restore the premises to the condition they were in on July 10, 1944, or pay the cost of such restoration; that the premises were to be continued to be used as a hotel and that the assignee or sublessee would pay the rent called for by the lease to the landlord and otherwise comply with the terms of the lease; that the term of such occupancy, assignment or sublease, would be from July 10, 1944 to June 1, 1946. Upon these assumptions, what, in your opinion, was the market value of the lessee's interest in that lease? In other words, what, in your opinion, would a willing purchaser have paid to a willing seller for the right to sublet or become the assignee of the premises involved for the period of July 10, 1944 to June 1, 1946?"

At this point, and prior to the witness' answer being given, an argument on points of law was had between counsel for the defendants. Counsel for defendant Lebenbaum stated that he assumed counsel for defendants Gawzner was seeking to prove there was no "bonus value" to the lease; said counsel further stated that such theory of valuation did not apply to the instant case, citing John Hancock Mutual Life Insurance Company v. United States, 155 F. 2d, 977, page 978, as follows:

"If, after a condemnation, a lessee [180] remains under obligation to pay rent, it is entitled to damages equal to the fair rental value of the leased premises. If the lessee is no longer under such obligation, then it is entitled only to the difference between the fair rental value and the rent stipulated in the lease."

Counsel for defendant Lebenbaum then pointed out that defendant Lebenbaum was still under the obligation to pay rent, that the lease had not been terminated; that defendants Gawzner maintained the lease had been terminated, and had refused to accept rent; that the so-called "bonus value" theory thus did not apply; that if it were true that the lease had no bonus value and if for that reason defendant Lebenbaum were not entitled to any portion of the award for the use and occupancy during the period involved, then it would not follow from that premise that defendants Gawzner would be entitled to all of it.

After further argument between counsel, the witness was allowed to answer the question, subject to a motion to strike, and the answer was that in the opinion of the witness the lease had no bonus value or market value as of the date the Government took over the premises. The witness gave as his reasons that the percentages of the gross receipts were too high, and the obligations imposed upon the tenant were too onerous. The witness also stated that the damage done to the hotel by the Army use would be about twice that which would

have been occasioned by civilian use, and for a lessee to obligate himself to put the property back and restore it would be "just prohibitive." That the breakage [181] fund of 3% of the income from beverages and rooms was so much additional rent, amounting to a maximum of $3,000 a year.

A second expert Charles G. Frisbie was called by defendants Gawzner, and a similar question was asked of him. A similar objection was interposed by counsel for defendant Lebenbaum, a similar ruling was made by the Court. The witness answered that in his opinion the lease had no bonus or market value. He stated that he had examined a number of different hotel leases, but had not found one with as high a rental; that the lease could not have been sold to anyone as of the date the Government took over.

On cross-examination the witness Frisbie stated that he based his opinion upon the terms of the lease itself, and not on other sales of similar leases; that the fact that the tenant of the Miramar Hotel property operated it at a substantial profit would not change his testimony; that he knew of the earnings of the lessee prior to July 10, 1944; that the fact that the lessee had expended $20,000 in improvements also would not vary his opinion; that a prospective purchaser would consider the terms of the lease, and would compare it with the terms of other leases he could get; that the only reason for a bonus on any lease would be that such lease contained very favorable terms which were lower than other leases.

The witness further stated that he was familiar with market conditions as they prevailed in the area during [182] the period of the Government's occupancy; that there were not many hotel leases available; that hotel properties reached a peak during the period from July 10, 1944 to June 1, 1946; that such properties were at an "all-time high" in earnings during such period.

The witness was then asked what, in his opinion, was the reasonable market rental value of the leased property, in its entirety, during that period of time; counsel for defendants Gawzner objected that such testimony was incompetent and immaterial; the objection was overruled, and the witness answered that in his opinion, for a period of 22⅔ months the figure would be $161,500; that he took into consideration the fact that the period of time was a very good one, that leading up to that time the occupancy had been greater and room rates were getting higher; that taking all those figures into consideration he thought the sum mentioned was a fair rental value of the entire property during that particular period; that he took into account the use which the Army would make of it and made the figure a little higher because of the nature of such use.

In answer to a question from the Court, the witness Frisbie stated that he knew of the financial statements of income and expense and net operation of the property as a hotel prior to the Government's occupancy, but in arriving at the value of the lease itself, its sale value, he took into consideration only

a comparison with other existing leases and the terms of such leases; that for a lease to have bonus value it must have lower terms than other available leases; that by "bonus value" he did not mean the same as market value; that he decided because of the [183] very high rate that was called for under the lease, no bonus value existed.

The Court then asked the witness what factors he considered when he gave the figure of $161,500, and he stated he considered the following matters:

That there were 135 rentable rooms; that occupancy rate was going up; that ordinarily on such percentage leases, as room sales, beverage sales, and food sales went up, ordinary costs came down, that is, there would not be so much cost per dollar of income; that the figure he mentioned was what he thought would be the fair rental value for the right to occupy the property and conduct a hotel business upon it, and sell food and liquor, and was the amount a man should pay for the use of the property during that period of time.

The witness then stated, in answer to a question from counsel for defendant Lebenbaum that he knew of no comparable hotel property in the vicinity of the premises taken which was available for lease, either by taking a new lease, or by purchasing an existing lease, during the period of the Government's occupancy. On further cross-examination, the witness stated that a prospective purchaser would be interested to know the past history of the property, what had been accomplished, if it had a

good occupancy; had the operator been able to obtain good rates on the rooms; that anyone getting a lease would consider the "business angle" of the property, but the two were separate things; one was the right to the property, which is the lease, and "the other is the business angle to it, to make a profit."

The witness further testified on direct examination [184] the reasonable value of the use and occupancy of the premises occupied by the Government, and owned by defendants Gawzner and not leased by defendant Lebenbaum, was $10,500 during the period involved.

Counsel for defendant Lebenbaum then moved to strike the testimony of both witnesses for defendants Gawzner to the effect that the lease had no bonus value, or market value on the ground that the "bonus value" theory did not apply, and on the further ground that neither witness based his opinion on any sales of hotel leases occurring at or near the period of time indicated; that neither witness took into account as an element in arriving at his opinion, the business operation of the property by the defendant Lebenbaum for the period from December 15, 1943 to July 10, 1944. The Court reserved a ruling on said motion.

On March 21, 1947, further trial was had; defendant Lebenbaum introduced the witness Lloyd S. Pettigrew, who produced a report made by Horwath and Horwath. The witness testified that his firm specializes in hotel accounting throughout the

United States; that his firm did the accounting for defendants Gawzner prior to the time the property was leased to Mr. Lebenbaum; that the witness was familiar with the lease; that his firm opened the books for Mr. Lebenbaum, as lessee of the hotel, and audited such books and prepared statements during Mr. Lebenbaum's operations. The witness was then asked the amount of net profit resulting to the lease during his period of operations.

To this, counsel for defendants Gawzner objected on the ground that such question constituted an attempt to [185] introduce profits resulting from the operation of a business, and was inadmissible in a condemnation proceeding; counsel for defendant Lebenbaum replied that the evidence was offered on the theory that, as testified by the witness Frisbie on cross-examination, a person buying a lease or a hotel in considering the business opportunity offered would consider the earning record of the hotel, and that such testimony would have a bearing on what a prospective purchaser would be willing to pay for a purchase of the lease.

Counsel for defendants Gawzner then stated that the rental previously paid might be considered, but that evidence of profits was inadmissible. Counsel for defendant Lebenbaum stated he conceded that the profits as such would not be recoverable as damages sustained through condemnation, but that such profits would be considered in fixing the market value of a piece of income property.

Counsel for defendant Lebenbaum stated he offered in evidence the report under discussion, the

same being Exhibit A of defendant Lebenbaum, and consisting of a financial statement prepared by the firm of Horwath and Horwath, covering the operations of Leo Lebenbaum, as lessee of the hotel premises during the period beginning January 1, 1944 to July 15, 1944. The report was received subject to a motion to strike. The Court reserved its ruling on said motion.

Prior to adjournment of the session of March 21, 1947, counsel for defendant Lebenbaum conceded that he could offer no evidence which would fix the value of the occupancy of the premises of defendants Gawzner not under lease at any figure lower than that [186] testified to by witnesses for defendants Gawzner, to-wit: $10,500; said counsel further stated that he would adopt the testimony given by one of the witnesses for defendants Gawzner, Mr. Frisbie, that the sum of $161,500 was the reasonable rental value of the hotel property during the period of the Government's occupancy, and that he urged such figure be used by the Court in arriving at its decision. He then pointed out that if the $91,000 agreed upon as restoration cost, and the $10,500 testified to as being the rental value of the premises not under lease were added to the sum fixed by Mr. Frisbie, the total would be $263,746, which sum was more than the total of $205,000 received by the defendants from the Government. Said counsel then stated:

". . . but I am trying to figure out an equitable means of having each party bear his share of having

accepted less from the government than the proof now before your Honor shows. In other words, had there been a verdict rendered according to the evidence that is now before your Honor, it would have been for $263,746, but we have destroyed that possibility by agreeing with the Government on a lesser sum."

Counsel for defendant Lebenbaum then suggested that if each of the three items were reduced to 77% of their amounts, the total would be the amount paid by the Government.

Counsel for defendants Gawzner stated that he did not agree on such computations; that the figure given by [187] the witness Frisbie as to rental value of the premises was given on cross-examination, and was not an item which the Court could consider as independent evidence.

On April 25, 1947, further trial was had, and a discussion ensued between counsel in open court concerning a list of expenditures which had been filed by defendant Lebenbaum, which list his counsel had stated in a memorandum dated April 14, 1947, represented a compilation of amounts spent by such defendant, or obligations incurred by him for furniture, furnishings, repairs, replacements, decorations, etc., necessary to place the premises in a condition for occupancy subsequent to the termination of the Government's use. That all items of merchandise covered by any of said expenditures were of as good character and value as the items of the same nature which were in the hotel at the commencement of the term of the lease, and none of the

items were for the repair or restoration of damage, loss, wear and tear occurring after the defendant Lebenbaum took possession of the premises from the Government.

Counsel for defendants Gawzner argued that some of the items on the list could not, under any decision the Court might render, be considered proper restoration, and called attention to some of the figures in dispute, mentioning that certain sheets replaced by Mr. Lebenbaum were not as good quality as those originally in the hotel as of July 10, 1944.

The Court then directed the attention of counsel to the stipulation with the Government, wherein the sum of $205,000 was represented as a fair, just and adequate compensation and in full settlement and compensation as to [188] damages arising out of any failure to restore the premises, real and personal, reasonable and ordinary wear and tear excepted. The Court then queried counsel whether an item, such as the sheets mentioned, when replaced by Mr. Lebenbaum might not equal in condition the sheets that were in the hotel on July 10, 1944, less ordinary wear and tear during the period of the Government's occupancy? Counsel replied:

"Mr. Burrill: I have my own ideas on it, your Honor, although I don't know whether they will be helpful to these gentlemen. But I think that gets us back to the old dispute we had between the government and the landlord and the lessee, and I believe for once Mr. Hearn and I will be in accord before your Honor when I say that we argued with the government counsel that it didn't make any dif-

ference, that, if they paid a specified rent that included ordinary wear and tear, as a part of the amount that they would pay, then their restoration item would be a certain figure. On the other hand, if they paid a rent which did not contemplate the use of ordinary wear and tear, then their restoration would be a greater figure. I think, as Mr. Hearn so aptly put it many times, that the government couldn't avoid paying for the ordinary wear and tear of the furniture in those [189] premises, regardless of which way they put it. If they didn't pay for it in restoration, then they must pay for it in rent. Am I quoting you correctly?

"Mr. Hearn: Much better than I can say it.

"Mr. Burrill: So that when we came to the settlement with the government, it is pretty much a question of taking the language of the stipulation and the language of the government as the government counsel wanted it written up, because they had complained about this ordinary wear and tear situation and argued about it for days. And I think as far as both Mr. Hearn and I were concerned, it was the outside amount of money that was involved rather than whether we said ordinary wear and tear or didn't. Am I not correct in that?

"Mr. Hearn: Yes; I think so.

"Mr. Burrill: Next, we included both restoration and rental in the amount of recovery we got from the government and we were willing to concede that what the government paid was rental and was restoration."

The Court then read a portion of the said stipulation to counsel.

"Mr. Hearn: If your Honor please [190] I understand that to mean this, that the government had an obligation to restore such damage as it might do to the property over and above ordinary wear and tear and that that obligation to so restore is deemed compensated by this judgment. However, that does not mean that the item of ordinary wear and tear entered into the judgment at no place whatsoever. It really entered into the balance of the judgment over and above that item of damages, that is to say, had we litigated the subject of how much damage the government did to the premises, then ordinary wear and tear would have been included over that particular question, but by the same token, as Mr. Burrill has said, it would have been included in the amount that was set up for rent. So that I understand the award that is now in the registry of the court includes a sum appropriate to ordinary wear and tear, probably under the heading of 'rent.' Do you so understand it, Mr. Burrill?

"Mr. Burrill: I understand that the judgment completely vindicated the government from any obligation that it had. It vindicates the government from any obligation of paying rent for the premises and also any damages that they had done. Now, I still contend that the language that was put in here was to avoid the dispute that [191] we had had with the government throughout that ordinary wear and tear had to be included in the rental item, and restoration cost is something over and above that. Now,

we are contending, on behalf of the defendant, and when I say 'we' I mean both Mr. Hearn and myself, that the government couldn't avoid paying for that ordinary wear and tear, whether they paid for it in restoration or whether they paid in rent. It had to be paid for in some fashion or another. But we had our stipulation and our judgment all inclusive, as I understand it, so that the government was vindicated completely there.

"The Court: That is true but the judgment is practically in the language of the stipulation and, on the bottom of page 2 of the judgment, it recites these words, the same as the stipulation recites, 'to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff and from the defendants, reasonable and ordinary wear and tear excepted.' If that isn't the formula that you are to use, I wish you gentlemen would give the court a formula that you would like to have used, so that we can segregate the outside from the [192] inside and whether a reasonable wear and tear is to be considered, or, if you can agree upon—or if you think the stipulation and the judgment are subject to more than one construction, I would like to know it. I have to take the record. I have to take your agreement."

After discussion between counsel, it was stipulated by them in open court that the sum of $91,296 represented the sum necessary to restore the premises into the condition that they were in as of July 10, 1944.

The Court then requested that counsel furnish a segregation of the amounts devoted to exterior, as distinguished from interior, restoration.

Counsel for defendants Gawzner then stated that such amounts had not been segregated, and in taking bids for restoration work, some of the bids had been taken for an all-over amount including work to be done on both exterior and interior premises. Said counsel further argued that as the entire premises, exterior and interior including furniture, belonged to the defendants Gawzner, such defendants should be given the entire award for restoration; that the owners were entitled to have the restoration done according to their desires.

Counsel for defendant Lebenbaum remarked that the defendants had not been able to agree on the colors in which certain portions of the premises should be redecorated, the pattern of the silverware, china, and many other items.

Both counsel stated at said hearing that they were unable to state how much the figure stipulated as restoration [193] cost represented repairs, which under the lease would be obligations of the tenant, and repairs, which under the lease, would be obligations of the landlord.

The Court then announced that if counsel could not agree to such segregation, it would be necessary to take evidence before the Court could make a ruling as to division of the remainder of the award.

Counsel for defendants Gawzner then observed that a situation confronted the parties which entailed

a major restoration never within the contemplation of the parties when the lease was executed; that the restoration required far exceeded any ordinary maintenance within the provisions of the lease, and the situation was such as not controlled entirely by the lease.

Counsel for defendant Lebenbaum stated he did not agree with counsel for defendants Gawzner; that on the contrary, he believed the language of the lease to be clearly applicable to the things that did happen, even though they were not contemplated.

The Court then stated it would render a decision when the parties made the segregation he had previously requested.

On May 12, 1947, a further trial was had, at which hearing counsel for defendant Lebenbaum announced a willingness to stipulate concerning the allocation of certain portions of the restoration award as being properly chargeable to the landlord under the lease, and certain other portions to the tenant, naming the items and sums covered.

Counsel for defendants Gawzner stated he was obliged to refuse to accept such stipulation, and rather [194] than attempt to break down the various figures and have some possible dispute as to whether or not any amount allocated to the exterior of the premises was properly spent or otherwise, would submit the suggestion that the entire restoration fund of $91,276 be spent under the joint control of the landlord and the lessee, said fund to be under the supervision of an interior decorator selected by the parties.

Counsel for defendants Gawzner further stated that his clients had already spent around $25,000 on restoration, and in addition had paid taxes and interest from the time the Government entered the premises.

Counsel for defendant Lebenbaum observed that a large portion of the expenditures made by Mr. Gawzner could not be considered as referable to damages done by the Government, and cited restoration of the roofs as a large item; that defendant Lebenbaum had offered to turn the entire restoration award over to defendants Gawzner and permit them to make restoration, provided Mr. Lebenbaum should be paid the sum of $18,000 which he had expended, plus the sum of $2,000 which remained in the restoration fund established by the lease.

On June 6, 1947, further trial was had, and at that time counsel announced that they had arrived at a stipulation covering the disposition of the fund allocated to restoration.

The said stipulation, dated June 5, 1947, and filed June 6, 1947, provided that out of the said sum of $91,296, defendant Lebenbaum should be paid $10,500, and defendants Gawzner $80,796.00; that the parties, upon payment of the respective sums as stipulated, waived any [195] further contentions in reference to the said sum allocated to the restoration, repair and replacement of the property condemned, both real and personal.

That the acceptance of said sums by the respective parties should be without prejudice to the rights of any of the parties to assert any and all

claims which they had theretofore advanced, or might thereafter advance in reference to the remaining portion of said total award, and that the Court should retain jurisdiction to determine the amount of the interests of the parties to the sum remaining in the registry of the court after the payment of the sums covered by the stipulation thus made.

In a memorandum filed November 25, 1947, by counsel for defendants Gawzner, the Court was informed of some of the terms of a further but unfiled stipulation, which counsel stated was entered into by the defendants concurrently with the stipulation executed June 5, 1947; this unfiled stipulation, which seems to have been a "stipulation upon a stipulation" is said to have provided that defendants Gawzner would use the sum of $80,796.00 to be paid to him under the stipulation filed of record, to accomplish complete restoration and repair of the premises "into at least as good condition as said premises were in on July 10, 1944." (Emphasis supplied.) The memorandum further stated that said unfiled stipulation also provided that defendant Lebenbaum was relieved from the provision of the lease which required him to deposit three per cent of the proceedings of the gross business as provided by Paragraph Seven of the lease from the date of July 10, 1944 to January 1, 1949, being the expiration date of the five year term of the lease.

Further trial was had on August 14, 1947, at which time the Court informed counsel for the de-

fendants that it was not satisfied with the evidence produced by the parties; that it was the desire of the Court that evidence be presented by a witness who would place himself in the position of a prospective buyer on July 10, 1944, one who would take the figures for the previous six-months operation and try to arrive at similar figures for the period during which the property was to be sub-leased, the period named in the amended complaint; the Court further stated it felt that a prospective purchaser would have considered such figures in determining how much he would offer for the property; that such prospective purchaser also would be obliged to consider the gross receipts during such period in order to determine what rent he would have to pay; that the Court had already asked counsel to agree upon an impartial expert who would present such evidence, but counsel had stated they could not so agree; the Court then suggested that each counsel present such evidence by their respective experts; counsel for defendants Gawzner stated he was compelled to decline to produce such testimony, for the reason that he did not consider such evidence a proper item to be considered. Counsel for defendant Lebenbaum stated he would endeavor to produce such evidence.

On October 22, 1947, counsel for defendant Lebenbaum presented as a witness Lloyd S. Pettegrew, who had testified earlier in the trial. Mr. Pettegrew reveiwed his qualifications as a hotel accountant; mentioned that the American Hotel Association had adopted a uniform system of accounts which was

used by about two-thirds of the [197] hotels in the country, which system provided for a departmentalization of the various operations such as food, rooms, beverages, and so on, and listed such expenses and income both by amounts and by percentages. Mr. Pettegrew stated he had placed himself in the situation as it was on July 10, 1944, and estimated or projected forward the operations of the hotel property under the lease for a year; that he did this using as a basis the past results both in the Miramar Hotel and similar hotels in the vicinity and in California, and by the use of trends that were in vogue, or were existing at that time, and had compiled the results of his work in the form of a report; the report was submitted in evidence as defendant Lebenbaum's Exhibit B over the objection of counsel for defendants Gawzner.

During his testimony, the witness was asked to explain certain computations contained in his report, Exhibit B, as contrasted to his report of actual operations previously introduced into evidence as Exhibit A. The witness explained that in Exhibit B, he had taken the position of a well-informed buyer, and had set forth in such report the matters which such buyer would endeavor to anticipate . . . what such buyer would consider before ascertaining the amount he would offer for purchasing the lease. Exhibit A showed a payment of rent by the lessee to the landlord during the 6 months of operation prior to the date of the Government's taking, of the sum of $30,904.53; Exhibit B showed an anticipated payment of rent by the lessee to the landlord dur-

ing the projected period of operation starting July 10, 1944 and ending July 10, 1945 of the sum of $91,648.02. Exhibit A showed the actual [198] profit of operation about 6%, while Exhibit B showed such anticipated profit at 20%. The witness explained that the same reasons justified the increase in all of his figures contained in Exhibit B over those contained in Exhibit A, stating, in effect:

During the six months period reflected in Exhibit A, the lessee had just begun operations, and the period involved was the "slack" season for a resort hotel; the property had to be put into shape, and the period reflected was mainly that of the winter season; there was presented a tremendous amount of pre-opening expenses, which in normal hotel operation are of a non-recurring nature, and which are normally incurred only during the first six months of operation; so that a prospective buyer, or the lessee himself, could reasonably and normally expect the anticipated figures shown in Exhibit B to become actualities, after the first six-months period of operation had occurred; that the hotel was in bad physical shape when Mr. Lebenbaum began operations; that the average hotel expends 10 or 11% of its room sales on repairs and maintenance; that during the 6 months period shown in Exhibit A, the tenant spent 22.16% for such repairs; during the period projected in Exhibit B the tenant's anticipated expenditure was set at 10.1%.

The witness further testified that the ratio of money received by the landlord to that received by

the lessee during the period covered by Exhibit A was about three to one. That such ratio was distorted for the reason that the tenant's expenditures were much greater than the ordinary expenditures; that the ratio projected by Exhibit B was 52% for the landlord and 47% for the tenant; [199] that if the tenant had not put most of his money into repairing the premises, and getting the hotel running, the ratio shown on Exhibit A would be nearer that shown on Exhibit B; that a prospective buyer would take into consideration the physical condition of the premises, and whether or not he would be obliged to make repairs after he entered into possession; that such prospective purchaser would also take into account that the $20,000 called for by the lease had already been deposited by the lessee and used for the benefit of the leased property.

At the conclusion of the testimony of the witness Pettegrew, the Court again informed counsel that it desired the advice of a witness not connected with either of the defendants as a witness, one chosen by the Court, whose compensation would be paid from the fund on deposit, if counsel could not join in producing such expert; both counsel declined to stipulate that such expert could be employed and so compensated; whereupon the Court indicated doubt that it would be able to render a decision without the benefit of independent expert advice, but stated it would endeavor to decide the matter upon the record.

Counsel for defendants Gawzner renewed his motion that the Court order payment to defendants

Gawzner of the sum of $10,500 as compensation for the use of the premises outside the lease; counsel for defendant Lebenbaum objected, stating that the award for the outside lands should not be made in full, when the award made for the land included in the lease could not be made in full. The Court reserved a ruling on the motion. [200]

We have concluded our attempt to summarize the proceedings which have covered such a long period of time in this Court; the issues involved have been the subject of much concern on the part of the Court, and we feel that this has been shared by the conscientious attorneys representing the Goernment and the defendants. The defendants have been successful in settling some of their disputes, and the Court is grateful that it has not been faced with the necessity of ruling whether pink wall-paper or blue wall-paper, or percale sheets or muslin sheets would be considered proper restoration, or whether an item involving two dollars or so is to be denominated maintenance after the lessee resumed operations, or restoration of damage occasioned by the Government. Each counsel has maintained that any stipulation made between the lessors and the lessee concerning a distribution of the amount of rental on the premises would result in a waiver of the respective contentions, i.e., that the defendants Gawzner are entitled to the entire amount and a similar contention of the defendant Lebenbaum that he is entitled to the entire amount. The Court has indicated repeatedly throughout these proceedings that it did not intend to rule that either the lessors

or the lessee should be awarded the entire amount to be allocated as rental of the leased premises, and if any stipulation has been made between counsel or the defendants concerning the division of such amount, such stipulation has not been disclosed to the Court.

It has been our view throughout the proceedings that any formula by which the amount due the defendants from the Government could be ascertained would include a [201] definition of market value of the leased premises to one who would devote the same to its highest and best use, to-wit: that of a resort hotel; that in ascertaining the value of such use, the "willing buyer" or sub-lessee would take into consideration the rental to be paid to the landlord; that such buyer would also wish to ascertain what profits might be gained from the operation of the property. It was our impression from the joint brief filed by the defendants, and from the brief filed by the Government prior to the date set for the jury trial, that evidence of profits made by the lessee during the period he operated the property would be given, there being no sales of comparable leases upon which to predicate a market value. We were also of the opinion that any definition of market value must entail a consideration of the terms of the lease; it is evident from the questions asked by counsel for defendants Gawzner of his expert witnesses that he shared the view that such market value would be based upon the terms of the lease.

Any definition of market value based upon the

terms of the lease must therefore include a consideration of the provisions of such lease concerning maintenance and restoration; the obligations imposed upon the lessee with reference to such matters, would, of necessity weigh heavily upon a prospective sub-lessee in his decision as to what price he would pay for the use and occupancy of the premises. Though we were not called upon during these proceedings to render a decision construing such provisions, we note the fact that even in the lease there exists uncertainty. Paragraph Five states that all expenses of upkeep, repair and replacement of the leased premises, [202] other than certain specified portions, shall be the obligation of the lessee, and Paragraph Seven states that it is the intention of the parties that the lessee shall maintain the furniture, etc. in the same condition as the same were at the commencement of the term, and to that end replacements shall be made from the replacement fund, with the object that upon the termination of the lease, the lessors shall "receive back furniture, furnishings and other personal property of as good character and value as the same is in at the commencement of the lease, and that at the termination of the lease any remainder of the replacement fund shall be used to repair and restore the personal property to the state it was in at the commencement of the term." Paragraph Thirteen, on the other hand, obligates the lessee at the termination of the lease, to surrender up peaceable possession of the premises to the lessors "in as good order and condition as the same were in at the com-

mencement of said term, reasonable use and wear thereof and damage by the elements excepted." (Emphasis supplied)

It is evident from the face of the pleadings and stipulations of record herein that counsel for the Government and counsel for the defendants were never able to agree upon whether the Government was obliged to restore the premises to the condition in which they existed prior to the taking, or whether it was obliged to restore to such condition, reasonable wear and tear excepted; from the statements of counsel it is plain that such disagreement was not resolved at the time the stipulation for the payment of $205,000 to the defendants was made. Had the Court been under the duty to instruct a jury in the main [203] proceeding concerning the obligation of the Government in this regard, the giving of such instruction would have entailed a most careful consideration of the terms of the lease and a comparison of such terms, as against the recitals in the various stipulations between the defendants and the Government.

It is also undisputed that the cost of maintenance and restoration required of the Government by reason of the extraordinary wear and tear occasioned the premises would have been far in excess of the similar cost to an ordinary sub-lessee who used the premises for hotel purposes.

It is true that the stipulation entered into between the Government and the defendants provided that the sum of $205,000 was to be considered as having been fixed by a jury as the total award for all

interests taken by the plaintiff, and for full satisfaction of all claims for damages against the United States arising from such taking, but it is equally true that no jury could have been instructed to include in its verdict the cost of restoration of wear and tear occurring after the Government left the premises, or compensation to the landlord for repairs which he would have been bound to make under the lease, or compensation to either of the parties for replacements to be made during a period in the future, and up to the termination of the lease. In their stipulations between themselves on the subject of maintenance and restoration, it is obvious that the defendants have made, or agreed to make, restoration beyond what would have been required of an ordinary sub-lessee under the terms of the lease; indeed, it appears that they have made restoration beyond that which could have been demanded of the Government, [204] assuming a concept of its obligations most favorable to the defendants.

Under the terms of the lease, the landlord would have been required to maintain certain portions of the premises, and the cost of such maintenance has been included, we assume from statements of counsel in the record, in the sum allocated by defendants by stipulation to restoration. Under the terms of the lease, the tenant would have been required to maintain certain portions of the premises and to make certain replacements, and the cost of those items has also been included in the sum mentioned.

The sum awarded by the stipulation with the

Government represents an amount which the defendants are to receive from their respective interests in the premises occupied by the Government, during which period the expenses of the landlord have been, as far as we have been able to ascertain, only the payment of the taxes, and the expenses to the lessee have been nothing; how much of the rental which the landlords would have received from a sub-lessee has been expended for the benefit of the landlord and how much of that sum has been included in the sum stipulated by the defendants as referable to restoration, we can not ascertain, and how much of that stipulated sum has been devoted to expenditures not referable to the terms of the lease, and to the benefit of the landlord or the lessee we likewise cannot ascertain; we are not informed as to the disposition of the $2,000 or so remaining in the replacement fund at the time the Government entered the premises; likewise, we have not been informed what value the parties placed upon the improvements left by the Government, which [205] improvements were stated in the stipulation with the Government to be a consideration in addition to the money award.

In urging that it would be inequitable to allow defendants Gawzner the full amount conceded to be the value for the use of the premises not under lease, counsel for defendant Lebenbaum observed that the funds remaining as compensation for the value of the use of the leased premises, and for the unleased premises, had by stipulation of the defendants, been "cut down in order to allocate a certain

amount to restoration." And, as observed by said counsel, "We are now in the situation of having settled for a certain number of dollars with the Government. There are so many dollars there, and the cloth, in other words, is not big enough to fit the pattern." We agree with this pertinent observation of counsel, and with the thought in mind that the obligations under the lease with regard to maintenance and replacement are such important portions of any pattern by which the respective interests of the defendants in the rental value of the premises may be intelligently determined, we add our own observation that the pieces of the pattern have been destroyed; as remarked by one of the counsel for the defendants, "the measuring stick of the lease had been lost."

Nor can we find any "measuring stick" or theory set forth in any of the cases cited during these proceedings, or in any consulted during our independent research, which can be used to aid us. The Court finds itself in a position similar to that described by the Court in the case entitled: "United States v. 25.4 Acres Of Land," reported at 65 F.S. 333, when that Court stated, in effect, [206] that the rule of fair market value could not apply, "for it is impossible to conjure up the proverbial figure of a willing buyer."

In the case before us, we are unable to conjure up the proverbial "willing buyer" or "willing seller" whose negotiations are conducted according to the principles of the law of eminent domain as

enunciated by our statutes and interpreted by the reported cases. The negotiations of the parties herein have resulted in stipulations which we deem of the same practical effect as if they had entered into a contract with the Government for the use and occupancy of the premises during the period mentioned at a price fixed thereby; the persons who, under the provisions of 258 (a) of Title 40, U.S.C.A., are entitled to a distribution of the fund thus obtained have conducted their own negotiations, up to a certain point, and have effected a partial division of the fund according to their own ideas; it is regrettable that the defendants have been unable to further divide the fund by stipulation; it is also regrettable that they have been unable to make, or in any event, to disclose to the Court, if they have made, a segregation of the items represented by the amounts received by each of them from the restoration fund; it is also regrettable that counsel have been unable to demonstrate any applicable basis of division which we can adopt, or adapt, to fit the particular circumstances of this case.

We do not agree that the "bonus theory" of value has any place in the division of the fund remaining; but were we disposed to accept such theory, and to give effect to the testimony of the witnesses for defendants Gawzner—witnesses who are each undeniably qualified generally in [207] their expert field—we should meet an unsurmountable barrier, in that such testimony was based on the provisions of the lease.

Counsel for defendants may each present to the Court proposed findings of fact and conclusions of law and judgment within twenty days from date hereof; such judgment shall recite that the entry of the same, together with the stipulations of the parties, as such stipulations are of [209] record herein, shall finally adjudicate all controversies between the defendants and all claims of either of them arising out of the condemnation proceedings instituted herein.

Dated August 25, 1948.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed Aug. 25, 1948. [210]

At a stated term, to wit: The September Term. A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 20th day of September in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Jacob Weinberger,
District Judge
[Title of Cause.]

Minute Order, Judge Weinberger's Calendar, Sept. 20, 1948, Nunc pro tunc as of Aug. 25, 1948.

It appearing that during the trial of the issues between the defendants herein certain objections

and motions to strike were directed to portions of the evidence, and that rulings on such objections and motions were reserved; that the Court, in making its memorandum of conclusions heretofore filed herein did not include a statement of its disposition of such objections and motions to strike;

And, it further appearing that in order to complete the record herein, a formal ruling upon such matters should be made,

It is Ordered: The objections made by defendant Lebenbaum to certain portions of the testimony of the witnesses Frisbie and Allen are over-ruled; similar motions to strike such testimony are denied.

The motion of defendants Gawzner to strike defendant Lebenbaum's Exhibit A is denied.

The motion of defendants Gawzner to strike a stipulation that Mr. Lebenbaum had deposited $20,000 upon the execution of the lease, and that all but $16.95 had been expended to the satisfaction of all defendants, is denied.

The motion of defendants Gawzner to strike the defendant Lebenbaum's Exhibit B is denied.

The objection of defendants Gawzner to certain testimony [211] of the witness Pettigrew, having to do with the giving by such witness of his opinion on whether a rate of operation of the hotel already testified to by such witness would be likely to continue from the period July 10, 1945 to June 1, 1946, is overruled; a similar motion to strike such testimony is denied.

It is Further Ordered; That this Order be entered nunc pro tunc as of August 25, 1948. [212]

Thomas H. Hearn, Attorney and Counselor at Law
400 City Hall, Los Angeles 12

October 6, 1948

Honorable Jacob Weinberger
Judge of the United States District Court
Federal Building
Los Angeles 12, California

In re: United States of America v. 21 Acres of Land, etc., et al., No. 3752W Civil.

Dear Judge Weinberger:

An unprecedented volume of work has delayed me in the preparation of proposed findings of fact and conclusions of law in the above entitled cause.

Furthermore, I find myself unable at this time to prepare a complete set of findings and conclusions for the reason that I am unable to devise any factual basis from which a calculation can be made resulting in the precise figures of the division of the award made by Your Honor. It is my impression that such a division should be based upon findings as to the values of the respective interests of the parties which were taken by the government in condemnation.

I have read with interest the proposed findings of fact and conclusions of law submitted by counsel for the defendants Gawzner and am willing to say, without prejudice, that those proposed findings and conclusions appear to offer a workable basis upon which we can proceed.

I believe it would be proper, and I most earn-

estly request, that there be included findings to the effect that the defendant Lebenbaum had performed all of the covenants of the lease on his part at the time the government took possession under these proceedings, including the expenditure of approximately $20,000 in rehabilitation of the property at or about the time that he took possession thereof, together with a finding that the lease was in good standing and in full force and effect at the time that the government took possession. I also [213] respectfully urge a finding to the effect that in entering into paragraph number ten of the lease the parties had in contemplation and intended to deal only with a possible condemnation of the fee title of the realty or of a highway or other permanent easement therein and did not contemplate or intend to deal with a mere temporary taking of the right to the use and occupancy thereof. For the fact of safety I also respectfully urge that conclusions of law be made in harmony with the above requested findings of fact.

I also believe it would be proper, and I respectfully request, that there be a finding to the effect that the defendant Lebenbaum has well, truly and promptly performed all of the terms, covenants and conditions of the lease on his part since he retook possession of the premises upon termination of the government's occupancy on June 1, 1946.

In view of the foregoing suggestions I respectfully urge that there be arranged a conference of court and counsel at which the matter of these findings and conclusions can be discussed, perhaps

informally. I am of the opinion that such a conference would successfully evolve the final fiindings, conclusions and judgment.

Respectfully yours,
PAUL R. COTE and
THOS. H. HEARN,
By /s/ THOS. H. HEARN,
Attorneys for defendant
Lebenbaum.

THH:emh
cc: Messrs. Hill, Morgan and Farrer
Attorneys at Law
411 West Fifth Street
Los Angeles 13, California
Attention: Mr. Burrill

[Endorsed]: Filed April 18, 1949. [214]

Hill, Morgan & Farrer
Attorneys at Law
1007-1022 Title Guarantee Building
Fifth Street at Hall
Los Angeles 13, California

October 13, 1948

Honorable Jacob Weinberger
Judge of the United States District Court
Federal Building
Los Angeles 12, California

Dear Judge Weinberger:

Re: United States of America v. 21 Acres of Land, etc., et al., No. 3752W Civil.

I am in receipt of a copy of Mr. Hearn's letter

to you dated October 6, 1948 in reference to the proposed findings of fact, conclusions of law and judgment submitted by our office on behalf of the defendants Gawzner in the above entitled case and proposing certain findings on behalf of the defendant Lebenbaum. I am taking the liberty of writing you in reference to Mr. Hearn's proposed findings in order that you many have in written form, my objections to certain findings which he suggests.

Mr. Hearn has suggested three specific findings, as I understand his letter. In order that this letter will clearly set forth objections made herewith on behalf of the defendants Gawzner, to such proposed findings, I will quote Mr. Hearn's suggested finding and the objections will be set out following each such quotation.

Mr. Hearn's first proposed finding reads as follows:

"I believe it would be proper, and I most earnestly request, that there be included findings to the effect that the defendant Lebenbaum had performed all of the covenants of the lease on his part at the time the government took possession under these proceedings, including the [215] expenditure of approximately $20,000 in rehabilitation of the property at or about the time that he took possession thereof, together with a finding that the lease was in good standing and in full force and effect at the time that the government took possession."

There is no material objection to this proposed finding. I submit, however, that no issue was ever raised that the lease was not in effect at the date the government filed the above entitled action and took possession of the premises involved. Therefore, the suggested findings proposed by Mr. Hearn would be surplusage. Likewise, if there is any finding in reference to the item of $20,000.00 I suggest that the finding conform to the facts as established at the trial, i.e., that the $20,000.00 was deposited in a separate fund in accordance with the terms of the lease and expended by the parties in accordance with such provisions prior to the government's taking, except for a nominal amount still on deposit in the joint bank account of the parties.

Mr. Hearn's second proposed finding and conclusion reads as follows:

"I also respectfully urge a finding to the effect that in entering into paragraph number ten of the lease the parties had in contemplation and intended to deal only with a possible condemnation of the fee title of the realty or of a highway or other permanent easement therein and did not contemplate or intend to deal with a mere temporary taking of the right to the use and occupancy thereof. For the fact of safety I also respectfully urge that conclusions of law be made in harmony with the above requested findings of fact."

I most strenuously object to such a finding, or any similar one. I respectfully urge that such a finding would be in error. There was no evidence offered or introduced which would tend to support

any such finding of fact. The conclusion of law that the lease in question was not cancelled by the institution of the above entitled proceedings and the notice given by the defendants Gawzner is incorporated in the findings and conclusions submitted by the writer on behalf of the defendants Gawzner. Such conclusion was in accordance with Your Honor's rulings during the trial. I respectfully call your attention to the fact that such conclusion was determined as a matter of law from the language of the lease and the notices given by the defendants Gawzner under the lease, particularly paragraph ten thereof.

Mr. Hearn's third proposed finding reads as follows:

"I also believe it would be proper, and I respectfully request, that there be a finding to the effect that the defendant Lebenbaum has well, truly and promptly performed all of the terms, covenants and conditions of the lease on his part since he retook possession of the premises upon termination of the government's occupancy on June 1, 1946."

Again I must object to such a finding. There is no evidence to support such, or any similar finding. I respectfully urge that such a finding would be in error. Your Honor will recall that the writer on behalf of the defendants Gawzner attempted to have the Court hear evidence of occurrences that took place subsequent to the date the government delivered up possession of the premises on June 1,

1946. In particular, we attempted to raise the issue of the alleged violation of the Orders for the Office of Price Administration by the defendant Lebenbaum subsequent to June 1, 1946. [217]

These issues were raised in a proposed Cross-Complaint filed on behalf of the defendants Gawzner. Mr. Hearn objected to any matters occurring subsequent to the date the government returned possession of the premises, i.e., subsequent to June 1, 1946. The court refused permission to file such proposed Cross-Complaint, and on motion of Mr. Hearn struck from such proposed Cross-Complaint all allegations referring to events occurring subsequent to the government returning possession of the premises.

In view of the position taken by Mr. Hearn at the trial, and the action he prevailed upon the Court to take at that time, we frankly are surprised, to say the least, that he should now request the Court to take an entirely contrary position and request the Court to make a finding upon an issue that he once convinced the Court should not be considered.

In conclusion, may we add that we are most anxious that findings, conclusions and judgment be signed and filed as promptly as is convenient to the Court. To that end we shall hold ourselves in readiness to meet any conference suggested by

the Court, or to attend any hearings that may be desired by the Court.

Respectfully yours,

/s/ STANLEY S. BURRILL,
STANLEY S. BURRILL Of
HILL, MORGAN & FARRER.

SSB:hs

CC—Messrs. Paul R. Cote and Thos H. Hearn
400 City Hall
Los Angeles 12, California [218]

[Endorsed]: Filed April 18, 1949.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON DISTRIBUTION OF AWARD PROVIDED FOR BY JUDGMENT AND DECREE IN CONDEMNATION PROPOSED AND REQUESTED BY DEFENDANTS PAUL GAWZNER AND IRENE GAWZNER

The above entitled cause came on regularly for trial before the above entitled Court, the Honorable Jacob Weinberger, Judge presiding without a jury, on March 18, 1947, for the determination and adjudication of the distribution of the award made by the Judgment and Decree in Condemnation made and entered in the above entitled cause on the 26th day of November, 1946, the defendants [223] Paul Gawzner and Irene Gawzner appearing by and

through their attorneys Hill, Morgan & Farrer by Stanley S. Burrill, Esquire, and the defendant Leo Lebenbaum appearing by and through his attorneys Paul R. Cote and Thos. H. Hearn by Thos. H. Hearn, Esquire, and it appearing to the Court that no other person, firm or corporation has appeared herein as to this issue of the above entitled cause or has made any claim or has any claim in and to the compensation paid by the plaintiff herein pursuant to the aforesaid judgment made and entered on November 26, 1946, and evidence, both oral and documentary, was offered and introduced by and on behalf of said defendants Paul Gawzner and Irene Gawzner and by and on behalf of said defendant Leo Lebenbaum and the cause was argued, both orally and by written briefs, and the cause was thereafter submitted to the Court for decision and the Court having made its Memorandum of Conclusions on August 25, 1948:

And the Court being fully advised in the premises hereby makes and files its Findings of Fact and Conclusions of Law.

Findings of Fact

I.

That the above entitled action is an action in eminent domain brought by the United States of America to condemn an estate or interest for a term of years commencing July 10, 1944, and ending June 1, 1946, in and to that certain property, both real and personal, which is more particularly

described in the Third Amended Complaint filed by the plaintiff in the above entitled action.

That the defendants Paul Gawzner and Irene Gawzner were named as defendants in said action as the owners of the said property sought to be condemned and the defendant Leo Lebenbaum was named in said action as a claimant of an interest in said property. [224]

That the said defendants Paul Gawzner and Irene Gawzner appeared in the above entitled cause and filed their answer to said Third Amended Complaint. That the defendant Leo Lebenbaum appeared in the above entitled cause and filed his answer to said Third Amended Complaint.

That the defendants Paul Gawzner and Irene Gawzner are husband and wife and each is an inhabitant of the State of California and resides in the County of Santa Barbara in said State. That the defendant Leo Lebenbaum is an inhabitant of the State of California and resides in the County of Santa Barbara in said State.

That this Court has jurisdiction of the subject matter of the within cause and the parties thereto.

II.

That on the 26th day of November, 1946, pursuant to a stipulation of the plaintiff, United States of America, and the defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum there was made and entered in the above entitled cause a Judgment and Decree in Condemnation wherein and whereby there was condemned and vested in the United States of America an estate

or interest in the property, both real and personal, therein described for a term of years commencing July 10, 1944, and ending June 1, 1946, (subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipelines) for use by said United States of America for the establishment of a Redistribution Station and related military purposes.

That by said Judgment it was determined that the sum of $205,000, without interest, was the fair, just and adequate compensation to be paid by plaintiff (United States of America) in full settlement and satisfaction of its obligation for the taking of the interest or estate condemned, together with all compensation to be [225] paid as damages arising out of any failure or default on the part of plaintiff (United States of America) in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by plaintiff from defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration.

That by said judgment the plaintiff (United States of America) waived its right to remove any and all improvements and structures placed upon said real property.

That by said judgment it was provided that the Court retained jurisdiction of said cause to determine the amount of the interests of all parties, who

had appeared in the within proceedings and who might thereafter appear in said proceedings, if any, in and to the compensation which was thereby ordered paid by the plaintiff (United States of America) the same as though a jury had rendered a verdict for said sum of $205,000, without interest, as their total award for all interests taken by the plaintiff (United States of America) in this proceeding, and for full compensation of all claims for damages against the United States of America arising from such taking, excepting that the defendant Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him payment of the sum of $1,672.23.

That said judgment of November 26, 1946, is by reference included herein and made a part hereof as if herein set out in full.

III.

That there has heretofore been deposited into the Registry of the Court prior to January 5, 1947, the sum of $203,327.77. [226]

That the defendant Leo Lebenbaum has received prior to January 5, 1947, from the United States of America the sum of $1,672.23.

That there has been withdrawn from the funds deposited in the Registry of the Court by the defendants Paul Gawzner and Irene Gawzner the sum of $1,594.02 for the purpose of paying one installment of County taxes.

IV.

That on or about December 15, 1943, the defendants Paul Gawzner and Irene Gawzner, as the owners of all of the property, the use of which property was condemned by plaintiff in the above entitled action, made and entered into a written lease of a portion of said premises to the defendant Leo Lebenbaum, the portion of said premises so leased being commonly known and referred to as the Miramar Hotel and Bungalows, and including in said lease all of the furniture, furnishings and fixtures of said hotel, the use of which furniture, furnishings and fixtures was condemned by plaintiff in the above entitled action.

That said lease was admitted in evidence in the within proceedings as Defendants Gawzner's Exhibit No. 1 and by said reference is included herein and made a part hereof as if herein set out in full.

V.

That paragraph numbered Ten of said lease provides as follows:

"Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, [227] Page 275, Official Records of Santa Barbara County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of

Santa Barbara or any other public body shall be condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

That acting under and pursuant to said paragraph numbered Ten of said lease the defendants Paul Gawzner and Irene Gawzner made and executed on August 4, 1944, and caused to be served on the defendant Leo Lebenbaum on August 11, 1944, a document entitled "Notice of Termination of Lease." That said Notice of Termination of Lease purported in substance to cancel and terminate said lease dated December 15, 1943, pursuant to the provisions of paragraph numbered Ten of said lease upon the ground that the institution of the [227] within entitled proceedings by the plaintiff (United States of America) and the taking of

possession of said premises pursuant to the above entitled proceedings gave to said defendants Paul Gawzner and Irene Gawzner the right to terminate said lease pursuant to the terms of said paragraph numbered Ten thereof.

That said Notice of Termination of Lease was admitted in evidence in the within proceedings as defendants Gawzner's Exhibit No. 2 and by said reference is included herein and made a part hereof as if herein set forth in full.

That by the giving of said Notice of Termination of Lease the defendants Paul Gawzner and Irene Gawzner intended to and attempted to cancel said lease dated December 15, 1943. That the defendants Paul Gawzner and Irene Gawzner by the giving of said Notice of Termination of Lease contend and have throughout these proceedings contended that said lease was thereby cancelled and terminated on September 10, 1944.

That said defendants Paul Gawzner and Irene Gawzner have not at any time since August 11, 1944, waived their said contention that said lease of December 15, 1943, was cancelled on September 10, 1944, by the acceptance of rent, or otherwise.

VI.

That the defendants Paul Gawzner and Irene Gawzner have not, nor have either of them, been paid any sum of money or other compensation for the use and occupancy of the premises, either real or personal, the use and occupancy of which was condemned by plaintiff (United States of America)

in the above entitled proceedings, for the period of July 10, 1944, to June 1, 1946, either by the defendant Leo Lebenbaum or the plaintiff (United States of America); save and except the withdrawal from the Registry of the Court from the funds deposited as aforesaid of the sum of $1,594.02. [229]

VII.

That on June 1, 1946, pursuant to Order of the within Court, made over the objection of the defendants Paul Gawzner and Irene Gawzner, the plaintiff (United States of America) returned to the defendant Leo Lebenbaum the possession of that portion of the premises, both real and personal, (the use of which had been condemned by plaintiff in the above entitled action) that was covered by said lease dated December 15, 1943, and returned to the defendants Paul Gawzner and Irene Gawzner the possession of that portion of the real property not covered by said lease (the use of which real property had also been condemned by plaintiff in the above entitled action).

That ever since June 1, 1946, said defendant Leo Lebenbaum has continued to occupy and retain possession of said premises, both real and personal, covered by said lease dated December 15, 1943, contrary to the Notice of Termination of Lease, above referred to, and contrary to the demands and wishes of said defendants Paul Gawzner and Irene Gawzner.

VII.

The defendants Paul Gawzner and Irene Gawzner produced on their behalf the witness Edward H. Allen, who was duly qualified as an expert on the valuation of real property and leasehold interests and shown to have knowledge of the property involved and other pertinent facts in connection therewith.

That said Edward H. Allen testified that said lease dated December 15, 1943, had no bonus or market value on July 10, 1944, and particularly that said lease had no market or bonus value for the period that the premises were occupied by the plaintiff (United States of America) pursuant to the above entitled proceedings and that said Edward H. Allen gave his reasons for such testimony. [230]

The defendants Paul Gawzner and Irene Gawzner produced on their behalf the witness Charles G. Frisbie, who was duly qualified as an expert on the valuation of real property and leasehold interests and shown to have knowledge of the property involved and other pertinent facts in connection therewith.

That said Charles G. Frisbie testified that said lease dated December 15, 1943, had no bonus or market value on July 10, 1944, and particularly that said lease had no market or bonus value for the period that the premises were occupied by the plaintiff (United States of America) pursuant to the above entitled proceedings and that said Charles G. Frisbie gave his reasons for such testimony.

That said testimony was undisputed and uncontradicted.

IX.

That the said Edward H. Allen and the said Charles G. Frisbie each testified that in their opinion the rental value of the premises owned by the defendants Paul Gawzner and Irene Gawzner not covered by said lease dated December 15, 1943, for the period of July 10, 1944, to June 1, 1946, (i.e. for the period of the Government's occupancy of said premises pursuant to the above entitled action) was the sum of $10,950. That said testimony was undisputed and uncontradicted. The defendant Leo Lebenbaum offered no evidence on this issue and his counsel conceded the evidence to be true that said rental value was $10,950.

X.

The defendant Leo Lebenbaum offered no testimony or evidence as to the market value or bonus value of the lease dated December 15, 1943, for the period of time that the Government occupied said premises. [231]

XI.

That there was received in evidence as direct testimony offered on the part of defendant Leo Lebenbaum and over the objection of the defendants Paul Gawzner and Irene Gawzner a financial statement of the operations of said defendant Leo Lebenbaum as lessee of said Miramar Hotel and Bungalows for the period from January 1, 1944, to July 15, 1944, which said statement, among other things,

disclosed the gross receipts, costs of operation and profits of said defendant Leo Lebenbaum in the operation of said hotel during said period. A motion to strike said statement from evidence made by the defendants Paul Gawzner and Irene Gawzner was denied by the Court. That said financial statement was admitted in evidence in the within proceedings as defendant Leo Lebenbaum's Exhibit A and by said reference is included herein and made a part hereof as if herein set out in full.

XII.

That there was received in evidence as direct testimony offered on the part of defendant Leo Lebenbaum and over the objection of the defendants Paul Gawzner and Irene Gawzner a report showing the estimated profit and loss for the assumed operation of said Miramar Hotel and Bungalows for the year of July 10, 1944, to July 10, 1945, (being a portion of the time the plaintiff (United States of America) was in possession of said premises pursuant to the within entitled condemnation proceedings). Said report, among other things, disclosed an estimated profit and loss statement for the assumed operation of the rooms department; an estimated profit and loss statement for the assumed operation of the food department; an estimated profit and loss statement for the assumed operation of the beverage department; an estimated profit and loss statement for the assumed operation of the beach club; an estimated [232] rent calculation

upon the foregoing assumed operations based upon the estimated gross income of said departments; and an estimated combined profit and loss statement of the assumed operations of said hotel showing the estimated profit to the lessee from the operation of said hotel.

Said report was admitted to be speculative by the witness who prepared it. A motion to strike said report from evidence made by the defendants Paul Gawzner and Irene Gawzner was denied by the Court. That said report was admitted in evidence in the within proceedings as defendant Leo Lebenbaum's Exhibit B and by said reference is included herein and made a part hereof as if herein set out in full.

That there was received in evidence as direct testimony offered on the part of the defendant Leo Lebenbaum and over the objection of the defendants Paul Gawzner and Irene Gawzner the testimony of the witness Pettegrew, who had prepared said report (defendant Lebenbaum's Exhibit B), that the same rate of operation or approximately the same rate of operation as was shown in said Exhibit B would be continued from the period of July 10, 1945, to June 1, 1946. A motion to strike said testimony from evidence made by the defendants Paul Gawzner and Irene Gawzner was denied by the Court.

XIII.

The undisputed and uncontradicted evidence shows that the defendants Paul Gawzner and Irene

Gawzner received as rental for said Miramar Hotel and Bungalows under the terms of said lease dated December 15, 1943, an average of $5,000 per month during the period from January 1, 1944, to July 10, 1944. [233]

XIV.

That during the trial of the within issues it was stipulated by the defendants Paul Gawzner and Irene Gawzner, on the one hand, and the defendant Leo Lebenbaum, on the other hand, that the portion of the award fixed and determined by the Judgment in the within cause dated November 26, 1946, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, was the sum of $91,296.00, and that said sum was the amount agreed upon to restore the premises into the condition that they were in as of July 10, 1944, when the plaintiff (United States of America) took possession of said premises pursuant to the above entitled proceedings and that said sum would cover all items of ordinary wear and tear during the period of the Government's occupancy.

That it was further stipulated between said defendants Paul Gawzner and Irene Gawzner, on the one hand, and defendant Leo Lebenbaum, on the other hand, that there should be paid out of the funds on deposit in the Registry of the Court from that portion of the Judgment allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid

stipulation, to wit, out of the sum of $91,296.00, to the defendants Paul Gawzner and Irene Gawzner the sum of $80,796.00 and to the defendant Leo Lebenbaum the sum of $10,500.00 and that upon the payment out of the Registry of the Court of said sums the said defendants Paul Gawzner and Irene Gawzner, on the one hand, and the said defendant Leo Lebenbaum, on the other hand, should waive any further contentions in the above entitled action in reference to said sum of $91,296.00 allocated to the restoration, repair and replacement of the property condemned, both real and personal, and it was further stipulated that upon the payment of the funds out of the Registry of [234] the Court to said parties, as aforesaid, that said stipulation should be conclusive between said parties as to their rights to that portion of the award made in the above entitled action allocated pursuant to stipulation of said parties to the restoration, repair and replacement of the property condemned in said action, both real and personal, but should be without prejudice to the rights of any said parties to assert and maintain in the above entitled action any and all claims which they had theretofore advanced, or might thereafter advance, in said litigation in reference to the remaining portion of said total award.

That said stipulation was made on the 5th day of June, 1947, was approved by the Court on June 6, 1947, and the Court on June 6, 1947, ordered the

payment out of the Registry of the Court from the amounts deposited in the above entitled action of the sum of $80,796.00 to the defendants Paul Gawzner and Irene Gawzner and the sum of $10,-500.00 to the defendant Leo Lebenbaum; that said stipulation and order were filed on the 6th day of June, 1947, and by said reference are included herein and made a part hereof as if herein set out in full.

That by said Order the Court retained jurisdiction of the above entitled proceedings to determine the amount of the interests of said parties in and to the compensation ordered to be paid by the plaintiff (United States of America) in the above entitled cause by the Interlocutory Judgment made and entered November 26, 1946, which remained after the payment of said sum of $91,296.00 to the parties in the amounts hereinabove set forth.

XV.

That the defendants Paul Gawzner and Irene Gawzner during the trial, by evidence, by objections, by motions to strike, by oral arguments and briefs, and prior to the entry of the Court's [235] Memorandum of Conclusions, Findings of Fact, Conclusions of Law and Judgment, made known to the Court the action which said defendants Paul Gawzner and Irene Gawzner desired the Court to take with respect to each of the matters thereafter ruled upon by the Court during the trial and ruled in the Court's Findings of Fact and Conclusions

of Law and discussed in the Court's Memorandum of Conclusions.

Conclusions of Law

From the foregoing Findings of Fact the Court concludes:

I.

That the above entitled action is an action in Eminent Domain arising under the laws of the United States and this Court has jurisdiction of the original cause of action and of the subject matter of the within cause and of the parties thereto.

II.

That the lease dated December 15, 1943, between the defendants Paul Gawzner and Irene Gawzner, as lessors, and the defendant Leo Lebenbaum, as lessee, of the premises commonly known as the Miramar Hotel and Bungalows, was not cancelled and terminated by the institution of the within entitled condemnation proceedings and the giving of the Notice of Termination of Lease, referred to in Paragraph V of the Findings of Fact, or otherwise.

III.

That the defendants Paul Gawzner and Irene Gawzner are not entitled to the payment of the entire award in the within proceedings pursuant to the provisions of Paragraph Ten of said lease dated December 15, 1943. [236]

IV.

That a just and equitable division of the remain-

der of the sum originally deposited in the Registry of the Court is as follows:

To the defendants Paul Gawzner and Irene Gawzner the sum of $69,344.00.

To the defendant Leo Lebenbaum the sum of $44,360.00.

From the sum adjudged due the defendants Paul Gawzner and Irene Gawzner there shall be deducted $1,594.02 as heretofore withdrawn from the Registry of the Court and from the sum adjudged due the defendant Leo Lebenbaum there shall be deducted the sum of $1,672.23 as having been paid by the plaintiff (United States of America) directly to the defendant Leo Lebenbaum and deducted from the amount paid into the Registry of the Court pursuant to said Judgment of November 26, 1946.

That the parties to this proceeding shall each bear their own costs.

V.

Dated this .... day of ....., 1948.

.....,

U. S. District Judge.

[Not signed.]

[Lodged]: April 18, 1949.

Affidavit of service by mail. [237]

[Title of District Court and Cause.]

MEMORANDUM RE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 25, 1948, we filed our memorandum

of conclusions in this matter and requested that counsel for defendants each present proposed findings of fact and conclusions of law and judgment in accordance with such memorandum within twenty days thereafter. On or about September 27, 1948, counsel for defendants Paul Gawzner and Irene Gawzner filed proposed findings of fact and conclusions of law and judgment; counsel for defendant Leo Lebenbaum have not complied with the request of the Court, but in a letter dated October 6, 1948, stated, in effect, that such counsel were unable to propose such findings of fact, etc. for the reason that their views were at variance with those of the Court, and suggested the inclusion of certain findings mentioned in said letter; no objections to the proposed [239] findings, etc. presented by counsel for defendants Gawzner were made by counsel for defendant Lebenbaum, but objections to the findings suggested in the letter above mentioned were made by counsel for defendants Gawzner.

No findings proposed by either counsel were in accordance with the opinion filed by the Court herein, with the exception of findings included in those proposed by counsel for defendants Gawzner as to matters already admitted by the parties.

The Court therefore found itself in the position of having rendered an opinion with which none of the parties concerned agree; the necessity of preparing findings without assistance of counsel suggested the advisability of a complete review by the Court of the matters in the record upon which the

Court had based its said opinion, and such review has been made.

Considerable time has elapsed between the rendition of our opinion and the filing of our findings of fact, conclusions of law and judgment; such delay has been occasioned by the complex nature of the problems involved in this cause, the inability of counsel to assist the Court in the preparation of the findings of fact and conclusions of law, and the demands upon the Court's time for the hearing and considering of criminal cases, petitions for injunctions and other matters having priority.

On this date the Court has completed and filed its findings of fact and conclusions of law and judgment; copies are being mailed to counsel, and counsel are reminded of the provisions of Rule 52, F.R.C.P. Section 6 concerning motions for amended findings.

Dated this 15 day of April, 1949.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed April 15, 1949. [240]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial before the above entitled Court, the Honorable Jacob Weinberger, Judge presiding without a jury,

on March 18, 1947, for the determination and adjudication of the distribution of the award made by the judgment and decree in condemnation made and entered in the above entitled cause on the 26th day of November, 1946, the defendants Paul Gawzner and Irene Gawzner appearing by and through their attorneys Hill, Morgan & Farrer by Stanley S. Burrill, Esquire, and the defendant Leo Lebenbaum appearing by and through his attorneys Paul R. Cote and Thos. H. Hearn by Thos. H. Hearn, Esquire, and evidence, both oral and documentary, having been introduced by testimony of witnesses and by [241] stipulations between the parties, and the cause having been argued, both orally and by written briefs, and the cause being thereafter submitted to the Court for decision, and the Court having made and filed its memorandum of conclusions on August 25, 1948;

And the Court being fully advised in the premises hereby makes and files its findings of fact and conclusions of law.

Findings of Fact

1.

That the original complaint herein was filed July 10, 1944, in the above entitled action which is an action in eminent domain instituted by the United States of America to condemn an estate or interest for a term of years commencing July 10, 1944, and ending June 1, 1946, in and to that certain property, both real and personal described in the third amended complaint filed October 23, 1946, which property consists of approximately twenty-one

acres of land in Santa Barbara County, California, bounded on the North by U. S. Highway 101 and on the South by 750 feet of beach frontage on the Pacific Ocean, and improvements thereon and all personal property located on said lands and used in connection with the operation of the hotel situated thereon, excepting foods and beverages, property of guests, and accounting records, together with the right to remove within a reasonable time after the expiration of the term or extension thereof, any and all improvements and structures placed thereon, by or for the United States.

2.

That defendants Paul Gawzner and Irene Gawzner were, at all times material to these proceedings, the owners in fee of the property described in the third amended [242] complaint, and defendant Leo Lebenbaum was at all such times the lessee from said owners of a portion of said property generally known as the Miramar Hotel, consisting of hotel buildings, furniture and furnishings and beach frontage; the property not under lease consisted of beach frontage, vacant land, and land improved by a garage.

3.

The lease heretofore mentioned is dated December 15, 1943, and covers a period of five years from date, with option for renewal for an additional five years. By the terms of said lease, the premises are to be used only for the purpose of carrying on the business of a hotel, and related activities; the

rent is fixed at 35% of the gross business from rental of rooms; 15% of the gross of business from sales of liquors, etc.; 5% of the gross business from the sale of food; a minimum rental of $1500 per month is guaranteed; the lessors covenant to keep the roof, foundations, structural supports and outer walls of all buildings in good repair; all other costs of upkeep, repair, replacement of the leased property, including the care of lawns, shrubbery, etc., being the obligation of the lessee; the lessee is required to deposit $20,000 in a bank, which fund is to be drawn upon by the parties for the purpose of making permanent improvements, which are to become the property of the lessor; the lessee is required to deposit monthly a sum equal to 3% of the gross business from rental of rooms, and sales of liquors, to the extent of $3,000 per year to be used as a replacement fund for the personal property so leased; to the end that upon the termination of the lease, the lessors shall receive back furniture, furnishings and other personal property of as good character and value as at the beginning of the lease: that any other [243] furniture provided by the lessee for use shall remain the property of the lessor upon the termination of the lease; that the lessors shall keep insurance of not less than $100,000 on the improvements and not less than $60,000 on the personal property, and shall pay all taxes levied upon the leased premises; that upon the termination of the lease, the lessee will surrender the premises to the lessors in as good order and condition as

the same were at the commencement of the term, reasonable use and wear thereof and damage by the elements excepted.

4.

The lease heretofore mentioned also provided that while the same does not cover said garage building, the lessee is given the right to use the same rent free for guests of the hotel, and further provides that in the event the lessor shall elect to improve and alter the building so that it may be used as a motion picture theatre, etc., or any other type of amusement center, the lessor shall, as part of the improvement, so alter the basement of the garage building, so that it may be used as a garage by the lessee, rent free, and that after such improvement, the lessor shall be free to operate, lease or contract for the use of the main floor of said garage, provided the same shall not be operated in a manner to compete with or be detrimental to the lessee.

5.

That Paragraph X of said lease provides as follows:

"Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa [244] Barbara County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ulti-

mately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall by condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

6.

That on July 10, 1944, the plaintiff entered into possession of the property described in said third amended complaint, which property will hereinafter be designated as the property involved herein, and thereafter, and until June 1, 1946, occupied and used said property, including the [245] upper portion, or main floor of the garage, as a Redistribution Station and for related military purposes.

7.

That the respective defendants have made their appearances in said condemnation proceedings, and by their respective answers each has asserted a claim to compensation to be paid for the use of the property condemned.

8.

That on August 4, 1944, a notice of termination of lease was served upon Leo Lebenbaum as lessee by Paul and Irene Gawzner as lessors which notice purported to cancel and terminate said lease upon the ground that the institution of the within proceedings and the taking of possession of said premises pursuant to the above entitled proceedings gave to said lessors the right to terminate said lease pursuant to the terms thereof.

9.

That on November 26, 1946, a stipulation was entered into by and between the United States of America and the defendants herein which provided for the entry of a judgment upon certain terms and conditions therein set forth, and in which stipulation the parties to the condemnation proceedings agreed to certain facts. The pertinent portions of said stipulation are as follows:

III.

That judgment may be forthwith entered herein in which there is condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July

10, 1944, and ending June 1, 1946; subject, however, to existing [246] easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution Station and related military purposes;

(b) That the sum of $205,000, without interest, except as hereinafter provided, is the fair, just and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; * * *

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it [247] within a reasonable time after July 1, 1946, as provided, set forth, and reserved

in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises.

IV.

That if competent witnesses were sworn and testified, their testimony would be that the sum of $205,000, without interest, together with the surrender of plaintiff's right to remove improvements and structures placed upon said premises by it and the vesting of title thereto in the legal owner of said premises, constitutes fair, just and adequate compensation to be paid by plaintiff to the parties entitled thereto for the taking of the estate and interest described in Paragraph III in the real and personal property hereinafter described in Paragraph V, together with full satisfaction of all damages which have accrued, or will accrue, by reason of the plaintiff's failure to make restoration, as more particularly set forth and described in subparagraph (b) of Paragraph III. * * *

VI.

That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed [248] pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of $205,000, without interest, as their total award for all interests taken

by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that defendant, Leo Lebenbaum, shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of $1,672.23. * * *

10.

That pursuant to such stipulation for judgment, a judgment and decree of condemnation was entered in such condemnation proceedings which judgment is dated November 26, 1946. The pertinent portions of said judgment are as follows:

"It Is Hereby Ordered, Adjudged and Decreed:

I.

That there be and is hereby condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July 10, 1944, and ending June 1, 1946; subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution [249] Station and related military purposes;

(b) That the sum of $205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same conditions as it was when it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; provided, however, that the deficiency provided for and set forth in subparagraph (c) herein shall have been paid into the Registry of this Court on or before January 5, 1947; otherwise, and in the event that default be made in the deposit of such deficiency on or before such date, such deficiency shall draw interest commencing January 6, 1947 at the rate of six per cent per annum, such interest to continue until the payment and deposit of the full amount thereof into [250] the Registry of this Court; * * *

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it within a reasonable time after July 1,

1946, as provided, set forth, and reserved in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises. * * *

III.

The Court retains jurisdiction hereof to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which is hereby ordered paid by the plaintiff herein, the same as though a jury had rendered a verdict for said sum of $205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, * * *"

11.

That on June 1, 1946, the plaintiff returned to Leo Lebenbaum and he accepted the possession of that portion of the premises it had occupied which was covered by the aforementioned lease, and also on said date plaintiff returned to Paul and Irene Gawzner and they accepted the [251] possession of that portion of the premises it had occupied not covered by said lease.

12.

That prior to July 10, 1944, the lessors and the lessee had performed their respective obligations under the lease, and the sum of $20,000.00 deposited by the lessee had been expended, with the exception of $16.95, in the manner provided by the lease, prior to said date.

13.

That during the period beginning July 10, 1944, and ending June 1, 1946, the lessee paid no rent to the lessors under the terms of the lease, or at all, and the lessors refused to accept any rent from said lessee during said period.

14.

That no repairs to the roof, foundations, structural supports and outer walls of the buildings on the leased premises were made by the lessors during the period of occupancy of the plaintiff; that no deposits into the replacement fund were made by the lessee during said period, and none of the other obligations imposed upon the lessee under the terms of the lease were performed by him during said period.

15.

During the trial of the proceeding concerning the determination and adjudication of the distribution of the amount paid by the plaintiff pursuant to said stipulation for judgment and judgment and decree of condemnation, an oral stipulation was made in open court between the lessors and the lessee as follows:

"It is stipulated that the portion of the award made [252] by the judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of $91,296."

16.

That by the said stipulation for judgment it was agreed that the surrender by plaintiff of its right to remove improvements and structures placed upon the premises and the vesting of title thereto in the legal owner of the premises was part of the compensation furnished by the plaintiff, in addition to the sum of $205,000; that no evidence was introduced whereby the Court can make a finding concerning the value of these improvements and what, if anything, these improvements added to the money compensation paid by the plaintiff.

17.

That by the said stipulation for judgment it was agreed that the consideration furnished by plaintiff included compensation for damages arising out of any failure or default upon the part of the plaintiff in performance of its obligation to restore such premises and the real and personal property so taken by it to its same condition as when received by the plaintiff, reasonable wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; that no evidence was introduced from which the

Court can make a finding concerning the time which was required for the completion of such restoration, or whether compensation therefor was included in the sum of $91,296, or, whether, if so included, such compensation was allocated by subsequent [253] agreements or stipulations to the lessors or to the lessee, or whether a portion of the sum remaining for division includes such compensation.

18.

That the wear and tear suffered by the premises while the same were occupied by the plaintiff was greater than that which would have been occasioned had the property been used by an ordinary lessee under the terms of the lease, and the cost of restoration replacement and repair necessitated by the occupancy of the plaintiff exceeded the cost of any maintenance which would have been required of an ordinary lessee under the terms of the lease, but no evidence was introduced whereby the Court can make a finding as to the extent of such excess wear and tear or as to the amount of such excess costs.

19.

That since June 1, 1946 and prior to the beginning of the trial of the proceedings for the division of the award, to-wit, March 18, 1947, and during said trial, and prior to June 6, 1947, both the lessors and the lessee had expended monies which each claimed to have expended in making the restoration, replacement and repair contemplated by the provisions of the stipulation for judgment and judgment and decree aforementioned, and esti-

mates were introduced in evidence as to the cost of completing such restoration, replacement and repair, but in many of the single estimates there were included in one sum items which, by the provisions of the lease, were obligations of the lessors, and items which likewise were the obligations of the lessee, and no evidence was introduced whereby such proportionate cost could be determined, and it likewise appeared that in [254] some instances the lessors had paid for the restoration, etc., of items properly chargeable under the provisions of the lease to the lessee, and that the lessee had in some instances paid for restoration, etc., of items properly chargeable under the provisions of the lease to the lessors, but no evidence was introduced whereby the Court could make a finding as to what portion of the funds expended by the lessors or the lessee in such matters were properly chargeable to the other defendants or defendant.

That as to some items, restoration, etc., to the leased premises was made to an extent beyond that necessary to restore the same to their condition as of the beginning of the lease, and to such an extent as to relieve either the lessee or the lessor, or both, of some of their respective obligations of maintenance under the lease for a period beyond that of the plaintiff's occupancy, which last mentioned restoration, etc., was not properly chargeable as restoration, repair and replacement occasioned by the occupancy of the premises by the plaintiff, but there is no evidence from which the Court can

make a finding as to the cost of such excess restoration, repair and replacement, and there is no evidence from which the Court can make a finding as to what portion of the fund was used, or should have been used, for the restoration, repair and replacement of the premises not under lease.

20.

That on June 6, 1947, the lessors and the lessee entered into a written stipulation whereby the said sum of $91,296.00 was divided between them, $80,796.00 being paid to defendants Gawzner and $10,500.00 to defendant Lebenbaum; by said stipulation it was provided that such allocation [255] should be conclusive as to the claim of each of the defendants to that portion of the fund allocated to the restoration, replacement and repair of the property condemned, both real and personal; that no evidence was introduced from which the Court could determine the basis upon which the defendants made the division mentioned in said stipulation; that the sum of $80,796.00, paid to defendants Gawzner, included compensation for making some of the restoration, etc., of items, which under the provisions of the lease it was the obligation of defendant Lebenbaum to maintain, and there was also included in said last mentioned sum compensation which relieved defendant Lebenbaum from making any deposit for replacement under the terms of the lease for a period extending beyond the period during which the plaintiff occupied the premises, but no evidence was introduced from which the Court can make a

finding as to the extent or cost of the items mentioned in this paragraph.

21.

That after deducting the sum of $91,296.00 withdrawn by the defendants as aforesaid, there remains of the award of $205,000.00 the sum of $113,-704.00. The lessors on the one hand claim that all of said sum is due them as compensation for the use of the premises leased and those not under lease, and the lessee, on the other hand, claims that he is entitled to all the compensation paid for the use of the leased premises.

22.

That said sum of $113,704.00 remaining does not represent a sum which, under the stipulation for judgment and judgment and decree can be found to be the entire compensation for the use of the premises which was paid for [256] such purpose by the plaintiff and accepted by defendants under the said stipulation for judgment and judgment and decree, for the reason that said sum has been depleted by the withdrawal by defendants of an amount part of which has been used for the making of restoration, replacement and repair to the leased premises to an extent greater than that contemplated by the said stipulation for judgment and judgment and decree; that no evidence has been introduced from which the court can make a finding as to what extent the fund properly referable to compensation for the use and occupancy of the premises has been depleted as above mentioned, or to what extent

said fund has been depleted for the purpose of relieving the defendants of some of their respective obligations under the lease for a period extending beyond that of the occupancy by plaintiff.

23.

That the fair market rental value for the occupancy of the upper portion of said garage during the period beginning July 10, 1944 and ending June 1, 1946, is the sum of $4412.00.

24.

That the fair market rental value for the occupany of the land not under lease during the period beginning July 10, 1944, and ending June 1, 1946, is the sum of $6088.00.

25.

That the highest and best use of the leased property involved herein, was, as of the date of July 10, 1944, the operation of a resort hotel, and activities connected therewith. [247]

26.

That on *July, 1944,* there was no hotel resort property comparable to the leased premises, at or near the vicinity of said premises, which was available for lease, either by taking a new lease, or the purchase of an existing lease, and there had been no sales of leases on similar hotels at or near said date.

27.

That the leased premises were operated as a resort hotel by defendant Lebenbuam for a period

of six months immediately prior to the occupation of said premises by the plaintiff; that during such period, there was paid to the lessor, as rent, a percentage of the gross receipts of the lessee which was about three times the net profit derived by the lessee; that the lessee during said six months period, expended monies for pre-opening expenses over twice as much as would be required during a like period of normal operation of such hotel; that the six months period of operation represented a "slack season" in resort hotel operation, and at the date plaintiff entered upon its occupancy of the leased premises, there was a demand by purchasers for resort hotels; that on such date an increase in the receipts from the operation of the various departments of said leased premises reasonably could have been foreseen, and a decrease in the proportionate cost of operation of such departments reasonably could have been foreseen, and a lessee, on July 10, 1944, would have been justified in expecting that his profits, during the period ending June 1, 1946, would bear a larger ratio to the rental paid, than during the preceding six months.

28.

That there is no competent evidence from which the [258] Court can make a finding as to the fair market rental value of the use and occupancy of the leased premises for the period involved in the condemnation proceedings based upon considerations of what a willing lessee would have paid to a willing lessor on July 10, 1944, as rental for said leased

premises for use as a resort hotel for said period, and there is likewise no competent evidence from which the Court can make a finding based upon considerations of what a willing sub-lessee would have paid for the right to sublet the leased premises for said purpose for said period.

29.

That the Court is unable to make a finding as to the respective interests of the defendants in the fund remaining for distribution based upon the market rental value of the premises condemned, for the reason, in addition to those set forth in its memorandum of conclusions of August 25, 1948, that the defendants, in their stipulation with plaintiff, have fixed the compensation for their interests on the condition of a different use than the highest and best use of the property condemned. [259]

Conclusions of Law

From the foregoing findings of fact the Court concludes:

1.

That the above entitled action is an action in eminent domain arising under the laws of the United States and this Court has jurisdiction of the original cause of action and of the subject matter of the within cause and of the parties thereto.

2.

That the lease dated December 15, 1943, between the defendants Paul Gawzner and Irene Gawzner, as lessors, and the defendant Leo Lebenbaum, as

lessee, of the premises commonly known as the Miramar Hotel and Bungalows, was not cancelled and terminated by the institution of the within entitled condemnation proceedings and the giving of the notice of termination of lease.

3.

That Leo Lebenbaum and Paul and Irene Gawzner are the only persons entitled to the fund deposited in the Registry of this Court by the plaintiff pursuant to said stipulation and judgment and decree of condemnation.

4.

That the defendants Paul Gawzner and Irene Gawzner are not entitled to the payment of the entire award in the within proceedings.

5.

That the defendant Leo Lebenbaum is not entitled to the payment of the entire award in the within proceedings. [260]

6.

That the lessee has not defaulted in his obligation to pay rent on the leased premises during the period beginning July 10, 1944 and ending June 1, 1946.

7.

That a just and equitable division of the remainder of the sum originally deposited in the Registry of the Court is as follows:

To the defendants Paul Gawzner and Irene Gawzner the sum of $69,344.00.

To the defendant Leo Lebenbaum the sum of $44,360.00.

From the sum adjudged due the defendants Paul Gawzner and Irene Gawzner there shall be deducted $1,594.02 as heretofore withdrawn from the Registry of the Court and from the sum adjudged due the defendant Leo Lebenbaum there shall be deducted the sum of $1,672.23 as having been paid by the plaintiff directly to the defendant Leo Lebenbaum and deducted from the amount paid into the Registry of the Court pursuant to said Judgment of November 26, 1946.

8.

That the monies awarded the respective defendants herein, together with the consideration expressed in the stipulations entered into between the parties since the filing of the condemnation action, constitute full satisfaction of all claims of the parties arising by virtue of the condemnation proceedings, and of all claims arising [261] between the lessors and the lessee by virtue of the lease during the period of the occupancy of the leased premises by the plaintiff, including any claim of the lessors against the lessee for rental under the lease during said period.

9.

That the parties to this proceeding shall each bear their own costs.

Dated this 15th day of April, 1949.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed April 15, 1949. [262]

[Title of District Court and Cause.]

JUDGMENT UPON DISTRIBUTION OF AWARD PROVIDED FOR BY JUDGMENT AND DECREE IN CONDEMNATION

The above entitled cause came on regularly for trial before the above entitled Court, the Honorable Jacob Weinberger, Judge presiding without a jury, on March 18, 1947, for the determination and adjudication of the distribution of the award made by the Judgment and Decree in Condemnation made and entered in the above entitled cause on the 26th day of November, 1946, the defendants Paul Gawzner and Irene Gawzner appearing by and through their attorneys Hill, Morgan & Farrer by Stanley S. Burrill, Esquire, and the [263] defendant Leo Lebenbaum appearing by and through its attorneys Paul R. Cote and Thos. H. Hearn by Thos. H. Hearn, Esquire, and it appearing to the Court that no other person, firm or corporation has appeared herein as to this issue of the above entitled cause or has made any claim or has any claim in and to the compensation paid by the plaintiff herein pursuant to the aforesaid judgment made and entered on November 26, 1946, and evidence, both oral and documentary, was offered and introduced by and on behalf of said defendants Paul Gawzner and Irene Gawzner and by and on behalf of said defendant Leo Lebenbaum and the cause was argued, both orally and by written briefs, and the cause was thereafter submitted to the Court for decision

and the Court having made its Memorandum of Conclusions on August 25, 1948, and the Court having heretofore signed and filed its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Ordered, Adjudged And Decreed:

I.

That a just and equitable division of the remainder of the sum originally deposited in the Registry of the Court is as follows:

To the defendants Paul Gawzner and Irene Gawzner the sum of $69,344.00.

To the defendant Leo Lebenbaum the sum of $44,360.00.

From the sum adjudged due the defendants Paul Gawzner and Irene Gawzner there shall be deducted $1,594.02 as heretofore withdrawn from the Registry of the Court and from the sum adjudged due the defendant Leo Lebenbaum there shall be deducted the sum of $1,672.23 as having been paid by the plaintiff (United States of America) directly to the defendant Leo Lebenbaum and deducted from the amount paid into the Registry of the Court pursuant to said Judgment of November 26, 1946.

II.

That the clerk of the above entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited in the above entitled action the following sums to the following persons:

To Paul Gawzner and Irene Gawzner, jointly, the sum of $67,749.98.

To Leo Lebenbaum the sum of $30,187.77.

To Paul Gawzner and Irene Gawzner, jointly, pursuant to that certain stipulation and assignment of interest in award dated July 23, 1946, executed by Leo Lebenbaum, Paul Gawzner and Irene Gawzner, which said stipulation and assignment was filed in the above entitled proceedings December 12, 1946, the sum of $12,500.00.

III.

The within judgment shall finally adjudicate all controversies arising between the parties to these condemnation proceedings and all controversies arising between the defendants by virtue of the lease dated December 15, 1943, during the period beginning July 10, 1944 and ending June 1, 1946.

IV.

The parties to these proceedings shall bear their own costs.

Dated this 15th day of April, 1949.

/s/ JACOB WEINBERGER,
U. S. District Judge.

Judgment entered April 15, 1949.
Docketed April 15, 1949.

[Endorsed]: Filed April 15, 1949. [265]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Paul Gawzner and Irene Gawzner, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from those portions of the Judgment Upon Distribution of Award entered in this action on April 15, 1949, which adjudge that a just and equitable division of the remainder of the sum originally deposited in the Registry of the Court requires the allocation to defendant Leo Lebenbaum of the sum of $44,360.00, or of any amount whatsoever, and fail to adjudge a cancellation of that certain Lease dated December 15, 1943, described in the Findings of Fact and Conclusions of Law herein; which order the Clerk of the Court to pay out to defendant, Leo Lebenbaum, the sum of $30,187.77, or any amount whatsoever, from said sum in the Registry [266] of the Court; and which require defendants, Paul Gawzner and Irene Gawzner, to bear their own costs.

HILL, MORGAN & FARRER

By /s/ ROBERT NIBLEY,
Attorneys for Defendants,
Paul and Irene Gawzner.

[Endorsed]: Filed April 28, 1949.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL AND TO STAY EXECUTION

Whereas, Paul Gawzner and Irene Gawzner appellants in the above entitled action have appealed to the Circuit Court of Appeals, 9th Circuit of the State of California, from a judgment made and entered on the 15th day of April, 1949, in the said United States District Court; and whereas said appellants desires to appeal from that portion of said judgment awarding, Leo Lebenbaum, respondent, the sum of $30,187.87 and from that portion of said judgment which requires said Paul and Irene Gawzner to bear their own costs;

Whereas, the Appellants are desirous of staying the execution of the said portions of the judgment so appealed from,

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Continental Casualty Company, a corporation organized and existing under the laws of the State of Illinois, and having an office and principal place of business at No. 310 South Michigan Avenue, City of Chicago, County of Cook, and State of Illinois, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant, and does

acknowledge itself justly bound in the sum of Five Thousand Dollars ($5000.00) that if the said portion of said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the Appellants will pay respondent the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the Appellants upon the appeal; and that if the appellants do not make such payment within thirty (30) days after the filing of the remittitur from the said Circuit Court of Appeals in the Court from which the appeal is taken, judgment may be entered in said action on motion of Respondent (and without notice to the undersigned Surety) in Respondents favor against the said Surety, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the Appellants upon the appeal.

In Witness Whereof, the corporate seal and the name of the said Surety Company is hereto affixed and attested at Los Angeles, California, by its duly authorized officer, this 28th day of April, A.D., 1949.

CONTINENTAL CASUALTY COMPANY,

[Seal] By /s/ STUART S. ROUGH,
Its Attorney-in-Fact,
Agent.

Examined and recommended for approval, pursuant to Rule 8 F.R.C.P.

Dated April 29, 1949.

/s/ ROBERT NIBLEY. [268]

State of California,
County of Los Angeles—ss.

On this 28th day of April, 1949, before me, H. Handorf, a Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared Stuart S. Rough, known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney-in-fact of the Continental Casualty Company, and acknowledge to me that he subscribed the name of the Continental Casualty Company thereto and his own name as Attorney-in-fact.

[Seal] /s/ H. HANDORF,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires July 25, 1952.

[Endorsed]: Filed May 5, 1949.

[Title of District Court and Cause.]

APPROVAL OF SUPERSEDEAS AND COST BOND

The within bond has been examined and recom-

mended for approval, as provided in Rule 8. The amount thereof is also approved.

HILL, MORGAN & FARRER
By /s/ ROBERT NIBLEY

I hereby approve the within bond as a Supersedeas and Cost Bond, and direct the Clerk, pending determination of the appeal herein, to withhold payment to defendant, Leo Lebenbaum, of funds from the Court Registry, and to stay further proceedings upon those portions of the judgment in this action appealed from by defendant Paul and Irene Gawzner.

Dated: This 4th day of May, 1949.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed May 5, 1949. [269]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Leo Lebenbaum, defendant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from those portions of that certain Judgment of the above entitled Court, entered in these proceedings on April 15, 1949 in Book 57, page 584 of Judgments wherein the Court adjudges that just and equitable division of the remainder of the sum originally

deposited in the registry of the Court requires allocation to defendants Paul Gawzner and Irene Gawzner, jointly, of the sum of $69,344, or any sum in excess of $10,500; which awards to Paul Gawzner and Irene Gawzner, jointly, the sum of $69,344 and directs the Clerk of the Court to pay said sum to them and which fails to award appellant Leo Lebenbaum a Judgment against Paul Gawzner and Irene Gawzner for his costs and disbursements herein incurred.

/s/ PAUL R. COTE,
Attorney for Leo Lebenbaum.

[Endorsed]: Filed May 13, 1949. [270]

[Title of District Court and Cause.]

COSTS BOND ON APPEAL

Know All Men By These Presents: That, Pacific Indemnity Company, a corporation organized and existing under the laws of the State of California, and duly licensed to transact business in the State of California, is held and firmly bound unto United States of America, Plaintiff, in the above entitled action, in the penal sum of Two Hundred Fifty & No/100 Dollars ($250.00), for which payment well and truly to be made, the Pacific Indemnity Company binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals and dated this 12th day of May, 1949.

The Condition of the above obligation is such that Whereas, the said Leo Lebenbaum, Defendant in the above entitled cause in the said United States District Court, Southern District of California, Central Division, is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment rendered and entered on the 15th day of April, 1949, by the United States District Court, Southern District of California, Central Division, in the above entitled cause.

Now, Therefore, the condition of the above obligation is such that if Leo Lebenbaum, shall pay all costs taxed against him if the appeal is dismissed or the judgment affirmed, or all such costs as the said Circuit Court of Appeals may award against him if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

The Premium charged for this bond is $10.00 per annum.

[Seal] PACIFIC INDEMNITY COMPANY

By /s/ W. C. BENING,
Attorney-in-Fact. [271]

State of California,
County of Los Angeles—ss.

On this 12th day of May, in the year one thousand nine hundred and forty-nine, before me, Atala M. Carter a Notary Public in and for said County

and State, residing therein, duly commissioned and sworn, personally appeared W. C. Bening known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said W. C. Bening acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Notarial Seal]

/s/ ATALA M. CARTER,
Notary Public in and for Los Angeles County, State of California.

My Commission Expires May 28, 1950.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Leo Lebenbaum, defendant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain Judgment of the above entitled Court, en-

tered in these proceedings on April 15, 1949 in Book 57, page 584 of Judgments.

Dated: May 16, 1949.

/s/ PAUL R. COTE,
Attorney for Leo Lebenbaum.

[Endorsed]: Filed May 16, 1949. [272]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR EXTENSION OF TIME FOR FILING RECORDS ON APPEAL AND DOCKETING APPEALS

Final Judgment in the above entitled action having been entered on April 15, 1949, and timely notices of appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit having been filed by defendants Paul Gawzner and Irene Gawzner on April 28, 1949, and by Leo Lebenbaum on May 13, 1949, and on May 16, 1949, and the Court having the power, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, to extend and fix the time for filing said defendants' respective records on appeal and docketing their respective appeals with the said Circuit Court of Appeals, and the said defendants desiring additional time for said filing and docketing [273] due to illness of counsel for defendant Leo Lebenbaum and absence from the city of counsel for defendants Paul Gawzner and Irene Gawzner.

Now, Therefore, It Is Hereby Stipulated by and between defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum, through their respective counsel, that the time for filing their respective records on appeal and for docketing their respective appeals to the Circuit Court of Appeals for the Ninth Circuit be extended to and including July 7, 1949, and said defendants respectfully request that the Court's order issue accordingly.

Dated: June 3, 1949.

HILL, MORGAN & FARRER,
and
STANLEY S. BURRILL,

By /s/ ROBERT NIBLEY,
Attorneys for Defendant
Paul Gawzner and
Irene Gawzner.

PAUL R. COTE,
By /s/ PAUL R. COTE,

Attorney for Defendant
Leo Lebenbaum.

Good cause appearing therefor, it is hereby ordered that the time within which defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum may file their respective records on appeal and docket their respective appeals herein with the Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and

including July 7, 1949. This order is made before the expiration of the period for filing and docketing as originally prescribed.

Dated: This 7th day of June, 1949.

/s/ JACOB WEINBERGER,
Judge.

Receipt of copy acknowledged.
[Endorsed]: Filed June 7, 1949. [274]

[Title of District Court and Cause.]

PERSONAL STAY BOND
(With Cash Deposit)

The undersigned, Leo Lebenbaum, is the owner of the sum of $2500, lawful money of the United States, which he herewith deposits with the Clerk of this Court pursuant to the order for Stay Bond on Appeal made by the Honorable Jacob Weinberger, United States District Judge, on June 17, 1949, conditioned that he will prosecute to effect his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Judgment of this Court entered herein on April 15, 1949 in Book 57, page 584 of Judgments; that if he shall fail to prosecute said appeal to effect, such deposited fund shall answer towards satisfaction of the use and detention of, and interest upon and damages for delay in, the receipt by Paul Gawzner

and Irene Gawzner, jointly, of the sum of $57,-249.98, being a portion of the sum of $67,749.98 awarded and directed to be paid by the foregoing Judgment to Paul Gawzner and Irene Gawzner, jointly, together with the costs of the action and costs on appeal, if any, not satisfied by the existing bond heretofore filed herein by the undersigned;

Pursuant to Rule 8(c) of the Local Rules of this Court, in case of the [275] default or contumacy on the part of the undersigned as principal and surety, this Court may, upon notice to the undersigned of not less than ten (10) days, proceed summarily and render judgment against him in accordance with the obligation herein contained and assumed by him and may award execution thereon.

Dated: 6/29, 1949.

/s/ LEO LEBENBAUM.

State of California,
County of Santa Barbara—ss.

On this 29th day of June, 1949, before me, a Notary Public in and for said County and State, duly commissioned and sworn, personally appeared Leo Lebenbaum, known to me to be the person whose name is subscribed to the within Personal Stay Bond, and acknowledged to me that he executed the same.

Witness my hand and seal the day and year first above written.

[Notarial Seal]

/s/ HENRY C. RAY,

Notary Public in and for said County and State.

My Commission Expires Feb. 2, 1953.

Approved as to form:

HILL, MORGAN & FARRER,

By /s/ STANLEY S. BURRILL.

Examined and recommended for approval as provided in Rule 8, this 5th day of July, 1949.

/s/ IRL D. BRETT,

Attorney.

I hereby approve the foregoing this 5th day of July, 1949.

/s/ JACOB WEINBERGER,

United States District Judge.

[Endorsed]: Filed July 5, 1949. [276]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR EXTENSION OF TIME FOR FILING RECORDS ON APPEAL AND DOCKETING APPEALS

This Court having heretofore made its order in the above entitled action extending time for filing records on appeal and docketing appeals to and including July 7, 1949, and the parties hereto finding that additional time will be required by them to file said records and docket said appeals, owing to the complexity of the matters involved, and

this Court having the power, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, to extend the time for filing defendants' respective records on appeal and docketing their respective appeals for a period of ninety days from the date of filing the first notice of appeal, which said date was April 28, 1949, and ninety days thereafter being July 27, 1949.

Now, Therefore, It Is Hereby Stipulated by and between defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum, through their respective counsel, that the time for filing their respective records on appeal and for docketing their respective appeals to the Circuit Court of Appeals for the Ninth Circuit be extended to and including July 27, 1949, and said defendants respectfully request that the Court's order issue accordingly.

Dated: June 29, 1949.

HILL, MORGAN & FARRER,
and STANLEY S. BURRILL,

By /s/ ROBERT NIBLEY,

Attorneys for Defendants
Paul Gawzner and
Irene Gawzner.

PAUL R. COTE,
By /s/ PAUL R. COTE,

Attorney for Defendant
Leo Lebenbaum.

Good cause appearing therefor, It Is Hereby Ordered that the time within which defendants Paul Gawzner and Irene Gakzner and defendant Leo Lebenbaum may file their respective records on appeal and docket their respective appeals herein with the Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including July 27, 1949. This order is made before the expiration of the period for filing and docketing as extended by a previous order.

Dated: This 5th day of July, 1949.

/s/ JACOB WEINBERGER,
Judge.

Receipt of copy acknowledged.
[Endorsed]: Filed July 5, 1949. [278]

[Title of District Court and Cause.]

JOINT DESIGNATION AND STIPULATION FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

The defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum join in this Designation and Stipulation for the preparation of the transcript of the record on appeal in said cause and You Are Hereby Requested and Directed to prepare a transcript of the record in said cause and certify the same to the Clerk of the United States Court of Appeals for the Ninth Circuit at

San Francisco, California, duly authenticated pursuant to the appeal of the defendants Paul Gawzner and Irene Gawzner and the cross appeal of the defendant Leo Lebenbaum in said cause, said transcript to be prepared in accordance with law and any rules of court applicable thereto.

It Is Hereby Stipulated and Agreed by and between defendants and appellants Paul Gawzner and Irene Gawzner and defendant and cross appellant Leo Lebenbaum in the above entitled cause, by and through their respective attorneys of record, that there shall be included in the record and transcript on the appeal of the defendants and appellants Paul Gawzner and Irene Gawzner and on the appeal of the defendant and cross appellant Leo Lebenbaum to the United States Court of Appeals for the Ninth Circuit from the Judgment of the above entitled District Court in the above entitled action entered therein on April 15, 1949, the following parts of the record, proceedings and evidence in said action, which are hereby designated to be included and and shall be included in and constitute the record on appeal of both the defendants and appellants Paul Gawzner and Irene Gawzner and the defendant and cross appellant Leo Lebebaum in said cause, to wit: [281]

1. Agreed Statement of Facts attached hereto as Exhibit A.

2. Third Amended Complaint in Condemnation, without inventory of personal property, (filed October 23, 1946).

3. Notice of Motion to File Answer to Third Amended Complaint and Cross Complaint.

4. Answer of Paul Gawzner and Irene Gawzner to Third Amended Complaint and Cross Complaint, without Exhibits A, C and D, (filed March 18, 1947).

5. Answer of Defendant Leo Lebenbaum to Second Amended Complaint, without Exhibit A, (filed November 6, 1945).

6. Order to Deposit Funds in the Amount of $52,693.55 under Military Appropriations Act (filed March 22, 1945).

7. Memorandum of Conclusions by Honorable Judge Hollzer dated June 30, 1945.

8. Notice of Motion for an Order Directing the Plaintiff to Deliver Possession of Premises to Defendant Leo Lebenbaum filed December 28, 1945.

9. Notice of Opposition to Order Directing the Plaintiff to Deliver Possession of the Premises to the Defendant Leo Lebenbaum filed January 2, 1946.

10. Notice of Motion for an Order Excluding Certain Defendants from Participation in Trial Proceedings filed December 28, 1945.

11. Notice of Motion for an Order Releasing Deposited Funds filed December 28, 1945.

12. Notice of Opposition to Order Releasing Deposited Funds filed January 2, 1946.

13. Memorandum of Conclusions by Honorable Jacob Weinberger dated April 30, 1946.

14. Minute Order of Honorable Jacob Weinberger April 30, 1946.

15. Stipulation between United States of America and Leo Lebenbaum in Re Surrender of Possession of Miramar Hotel, filed June 17, 1946.

16. Receipt for possession of premises executed by Leo Lebenbaum on June 17, 1946.

17. Stipulation between United States of America and Paul Gawzner and Irene Gawzner re Surrender of Possession of Portion of Property taken by the United States filed July 10, 1946.

18. Receipt for Possession of Premises executed by Paul Gawzner and Irene Gawzner filed September 13, 1946.

19. Stipulation re Withdrawal of Funds on Deposit filed August 3, 1946.

20. Petition for Withdrawal of Funds on Deposit filed August 29, 1946.

21. Responsive Statement of Plaintiff in Connection with Defendants' Petition for Withdrawal of Funds on Deposit filed August 29, 1946.

22. Stipulation for Judgment filed November 26, 1946.

23. Judgment and Decree in Condemnation filed November 26, 1946.

24. Stipulation and Assignment of Interest in Award filed December 12, 1946.

25. Stipulation re Payment of Portion of Award and Order for Payment of Funds on Deposit with the Registry of the Court filed June 6, 1947.

26. All testimony and proceedings at all hearings, proceedings and trial on issues between defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum prepared by the official reports and being transcripts of the proceedings occurring on the following days:

January 17, 1947—pages 1 to 101 inclusive.
February 28, 1947—pages 1 to 18 inclusive.
March 18, 19, 20, 1947—pages 1 to 258 inclusive.
March 21, 1947—pages 259 to 340 inclusive.
April 25, 1947—pages 1 to 59 inclusive.
May 12, 1947—pages 1 to 22 inclusive.
June 6, 1947—pages 1 to 24 inclusive.
August 14, 1947—pages 1 to 38 inclusive.
October 22, 1947—pages 1 to 84 inclusive.
January 23, 1948—pages 1 to 5 inclusive.

27. Stipulation as to Record on Appeal.

28. Defendants Gawzner Exhibit 1 (Lease).

29. Defendants Gawzner Exhibit 2 (Notice of termination).

30. Defendants Gawzner Exhibit 3 (Map).

31. Defendant Lebenbaum's Exhibit A (Horwath & Horwath report).

32. Defendant Lebenbaum's Exhibit B (Pettegrew report).

33. Memorandum of Conclusions filed August 25, 1948.

34. Minute Order of September 20, 1948, Nunc pro tunc as of August 25, 1948.

35. Findings of Fact and Conclusions of Law upon Distribution of Award provided for by Judgment and Decree in Condemnation Proposed and Requested by Defendants Paul Gawzner and Irene Gawzner filed September 27, 1948.

36. Letter dated October 6, 1948, addressed to Honorable Jacob Weinberger, Judge of United States District Court, executed by Paul R. Cote

and Thos. H. Hearn by Thos. H. Hearn re proposed Findings. [285]

37. Letter dated October 13, 1948, addressed to Honorable Jacob Weinberger, Judge of United States District Court, executed by Stanley S. Burrill of Hill, Morgan & Farrer re proposed findings.

38. Findings of Fact and Conclusion of Law dated April 15, 1949.

39. Judgment upon Distribution of Award provided for by Judgment and Decree in Condemnation.

40. Notice of Appeal filed April 28, 1949, by defendants Paul Gawzner and Irene Gawzner.

41. Supersedeas and Cost Bond filed on behalf of defendants and appellants Paul Gawzner and Irene Gawzner and Approval of Supersedeas and Cost Bond.

42. Notice of Appeal filed May 16, 1949, by defendant Leo Lebenbaum.

43. Cost Bond executed by Pacific Indemnity Company on behalf of defendant Leo Lebenbaum.

44. Stay Bond on Appeal filed by defendant Leo Lebenbaum.

45. Stipulation and Order for Extension of Time for Filing Records on Appeal and Docketing Appeals, filed June 7, 1949.

46. Stipulation and Order for Extension of Time for Filing Records on Appeal and Docketing Appeals, filed July 5, 1949.

47. Appellants Paul Gawzner and Irene Gawzner Concise Statement of the Points on which said appellants intend to Rely on Appeal.

48. Cross appellant Leo Lebenbaum Statement of Points on which said Cross Appellant intends to Rely on Appeal.

49. This Designation and Stipulation.

Dated: July 20, 1949.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,

Attorneys for defendants and appellants Paul Gawzner and Irene Gawzner.

PAUL R. COTE,
By /s/ PAUL R. COTE,

Attorneys for defendant and cross appellant Leo Lebenbaum. [287]

(Exhibit A to Joint Designation and Stipulation)
AGREED STATEMENT OF CERTAIN FACTS

It Is Stipulated and Agreed by and between defendants and appellants Paul Gawzner and Irene Gawzner and defendant and cross appellant Leo Lebenbaum through their respective counsel that the record discloses the following facts by documents which are not designated separately in the designation of the record and, for the purposes of abbreviation, only the pertinent facts are supplied:

1. On July 10, 1944, the United States of America instituted this action by filing a Complaint in

Condemnation substantially in the form of the Third Amended Complaint (set forth in the record in full and referred to as designation number 2), except that said original complaint sought to acquire the property involved for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the then existing national emergency at the election of the United States of America, notice of such election to be filed in the within proceedings at least thirty days prior to the end of the term thereby taken or subsequent extensions thereof.

2. Possession of the premises involved was taken by the United States of America without court order pursuant to the provisions of the Second War Powers Act (Public Law 507—77th Congress) on July 10, 1944, at 1:00 o'clock P.M.

3. Answers were filed to the original complaint by defendants Paul Gawzner and Irene Gawzner and by defendant Leo Lebenbaum.

4. On April 10, 1945, pursuant to leave of Court, the United States of America filed an Amended Complaint in substantially the form of the original Complaint except that there was added thereto as Exhibit A a complete and detailed list and description of all personal property, the use of which was condemned and taken by the said United States of America; that said exhibit consisted of 130 pages of detailed listed articles constituting the furnishings and equipment of said hotel. [289]

5. By stipulation of the parties the respective

answers of said defendants to the original Complaint were deemed to be answers to the Amended Complaint.

6. On May 24, 1945, the United States of America filed in the within cause its election to renew for an additional period of one year its right to the exclusive use and possession of the property acquired in the above entitled proceedings, i.e., from July 10, 1945 to July 10, 1946.

7. On October 29, 1945, pursuant to leave of Court, the United States of America filed a Second Amended Complaint in substantially the form of the Amended Complaint except that the term for which the property involved was taken was made certain, to wit, for a term of years commencing July 10, 1944, and ending November 20, 1945.

8. Said defendants filed their respective answers to the Second Amended Complaint.

9. The defendants Paul Gawzner and Irene Gawzner opposed the motion of the defendant Leo Lebenbaum for an Order Excluding the Defendants Gawzner from Participation in Trial Proceedings. The Notice of said Motion is Designation number 10.

10. On October 23, 1946, pursuant to leave of Court, the United States of America filed a Third Amended Complaint in substantially the form of the Second Amended Complaint except that the term was made certain to cover the entire period that the property was actually in possession of

the United States of America, i.e., from July 10, 1944, to June 1, 1946. Said Third Amended Complaint is Designation number 2.

11. Prior to the Judgment and Decree in Condemnation entered November 26, 1946, the United States of America exercised its option pursuant to law requiring the defendants to join in their defense against the plaintiff so that all rental value and damages would be fixed as a unit regardless of the respective rights of the defendants in and to the award. The Court approved and authorized such procedure. [291]

12. During the trial of the distribution of the award between the defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum, it was stipulated by said parties that the answer of defendant Leo Lebenbaum to the Second Amended Complaint was deemed to be the Answer of said defendant to the Third Amended Complaint and so ordered by the Court. Said Answer is designation number 5.

13. Defendants Paul Gawzner and Irene Gawzner filed their Answer to the Third Amended Complaint and lodged their Cross Complaint. This Answer and the Cross Complaint are designation number 4. The Court permitted the filing of Paragraphs 1, 2, 3, 23, 24, 25, 26 and 27 of the Cross Complaint to be deemed a part of the Answer of said Defendants Paul Gawzner and Irene Gawzner. The Court did not permit the filing of Paragraphs 4, 5, 21 and 22 of the Cross Complaint.

The Court likewise refused permission to file Paragraphs 6 to 22, inclusive, of said Cross Complaint, but the defendants Paul Gawzner and Irene Gawzner do not now predicate error on such refusal.

14. On March 22, 1945, the United States of America petitioned the trial court for leave to deposit as estimated compensation the sum of $52,693.55. On the same date the trial court ordered and allowed such deposit. Said order is set out in the record. (Designation number 6.) On March 23, 1945, said sum of $52,693.55 was deposited in the registry of the court.

15. On April 18, 1945, pursuant to a stipulation of all parties and order of the trial court the sum of $1,594.02 was paid to defendants Gawzner for taxes paid by them and as a credit upon any moneys to which they should be awarded herein by judgment.

16. On November 2, 1945, the United States of America petitioned the trial court for leave to deposit as estimated compensation the sum of $13,500. Said petition was granted on November 19, 1945, and said sum of $13,500 was deposited in the registry of the court on November 20, 1945.

17. On December 27, 1945, the United States of America petitioned the trial court for leave to deposit as estimated compensation the sum of $7500. Said petition was granted on January 18, 1946, and said sum of $7500 was deposited in the registry of the court on April 25, 1946. [293]

18. On January 3, 1947, the United States of America deposited the deficiency in the judgment dated November 26, 1946, in the sum of $129,634.22 in the registry of the court.

19. On October 21, 1946, the Court denied the Petition for Withdrawal of Funds on Deposit (Designation number 20) without prejudice pursuant to consent of all appellants.

20. The United States of America offset the sum of $1672.23 against an indebtedness due it from cross appellant Leo Lebenbaum in the Judgment of November 26, 1946 (Designation number 23) and said sum has been credited to him in the Judgment dated April 15, 1949 (Designation number 39).

21. Both appellants Gawzner and appellant Lebenbaum had other attorneys for whom their present attorneys were regularly substituted.

22. The moneys ordered distributed for restoration by the order dated June 6, 1947 (Designation number 25) were disbursed to and received by the respective parties in the amounts therein stated and their receipts and partial satisfactions have been filed. [294]

23. In addition to the moneys paid by the United States of America pursuant to the Judg-

ment dated November 26, 1946, it relinquished and left thereon improvements and equipment which it had erected and installed on the leased premises during its occupancy.

Dated: July 20, 1949.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,
By /s/ STANLEY S. BURRILL,

Attorneys for defendants and appellants Paul Gawzner and Irene Gawzner.

PAUL R. COTE,
By /s/ PAUL R. COTE,

Attorney for defendant and cross appellant Leo Lebenbaum.

[Endorsed]: Filed July 20, 1949.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It Is Hereby Stipulated by and between defendants and appellants Paul Gawzner and Irene Gawzner and defendant and cross appellant Leo Lebenbaum through their respective counsel that the designation of the record as jointly prepared and filed

by appellants and cross appellants constitutes the complete record desired to be filed in the United States Court of Appeals for the Ninth Circuit; and

It Is Further Stipulated that the stipulating parties each have copies of the exhibits and of the Reporter's transcripts of the proceedings, which are described in said designation of the record and that the Clerk's copies of each thereof, or the originals of each thereof, which have heretofore been filed, may be transmitted to said Court of Appeals in conformity with Rule 75 (o) of the Rules of Civil Procedure for the United States District Courts as adopted by Rule 11 of the United States Court of Appeals for the Ninth Circuit.

Dated this 20th day of July, 1949.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,
By /s/ STANLEY S. BURRILL,

Attorneys for defendants and appellants Paul Gawzner and Irene Gawzner.

PAUL R. COTE,
By /s/ PAUL R. COTE,

Attorney for defendant and cross appellant Leo Lebenbaum.

[Endorsed]: Filed July 20, 1949. [297]

(e) The defendants and appellants Paul Gawzner and Irene Gawzner as owners of the property acquired by the plaintiff United States of America were not awarded the reasonable value of the use of said premises or the reasonable rental value thereof.

(f) The award to the defendant and cross appellant Leo Lebenbaum was for his loss of business and prospective profits.

(g) The award was divided between the defendants on some ratio based upon the reasonable rental or use value of the premises to the defendants and appellants Paul Gawzner and Irene Gawzner, as lessors, and the prospective profits of defendant and cross appellant Leo Lebenbaum, as lessee.

(h) There is no competent evidence to support such a division of said award.

5. The Court erred in holding in Finding number 17 that there was no evidence introduced as to whether or not a portion of the fund remaining for division, after the allocation of $91,296 for restoration, was to include compensation for the time necessary for restoration in that all issues as to restoration were settled by stipulation of the parties.

6. The Court erred in holding in Finding number 18 that no evidence was introduced whereby the Court could make a finding as to excess wear and tear or excess costs of restoration in that all issues as to restoration were settled by the parties and the sum of $91,296 was the agreed amount for restoration.

7. The Court erred in holding in Finding number 19 that no evidence was introduced as to the portion of the funds allocated to restoration which were properly chargeable to each defendant in that all divisions of the restoration fund were settled by stipulation of the parties.

8. The Court erred in holding in Finding number 19 that as to some items, restoration was made to an extent beyond that necessary to restore to the same condition as of the beginning of the lease and, therefore, not properly chargeable to restoration or damage caused by the plaintiff in that the parties agreed by stipulation that the sum of $91,296 was the amount necessary for restoration. [302]

9. The Court erred in holding in Finding number 19 that there was no evidence from which the Court could make a finding as to what portion of the fund was used or should have been used to restore the premises not covered by the lease in that all divisions of the restoration fund were settled by stipulation of the parties.

10. The Court erred in holding in Finding number 22 that the sum of $113,704 does not represent a sum which can be found to be the compensation for the use of said premises because the total judgment of $205,000 had been depleted by an excess amount for restoration, in that such finding is contrary to the evidence and contrary to the stipulation of the parties.

11. The Court erred in considering in Finding number 27 the profits which the defendant and

cross appellant Leo Lebenbaum, as lessee, received or might receive from the operation of the hotel business and the ratio of those profits to rental for the premises.

12. The Court erred in making Finding number 28 in that the undisputed and uncontradicted testimony is contrary to such finding.

13. The Court erred in making Finding number 29 in that the undisputed and uncontradicted evidence is contrary to such finding.

14. The Court erred in admitting in evidence over the objections of the defendants and appellants Paul Gawzner and Irene Gawzner and in failing to strike from the evidence defendant and cross appellant Lebenbaum's Exhibits A and B.

15. The Court erred in admitting in evidence over the objection of the defendants and appellants Paul Gawzner and Irene Gawzner and in failing to strike from the evidence testimony as to profits of defendant and cross appellant Leo Lebenbaum both past and prospective profits of the operation of said hotel.

16. The Court erred in admitting in evidence over the objection of the defendants and appellants Paul Gawzner and Irene Gawzner and in failing to strike from the evidence the testimony of the witness Lloyd S. Pettegrew produced by defendant and cross appellant Leo Lebenbaum as to such past and prospective profits of the operation of said hotel.

17. The Court erred in refusing to the defend-

ants and appellants Paul Gawzner and Irene Gawzner permission to file Paragraphs IV, V, XX and XXI of their Cross Complaint and Exhibit B attached thereto.

18. The Court erred in not signing the Findings of Fact submitted by the defendants and appellants Paul Gawzner and Irene Gawzner.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,
By /s/ STANLEY S. BURRILL,

Attorneys for defendants and appellants Paul Gawzner and Irene Gawzner.

[Endorsed]: Filed July 20, 1949. [305]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant, Leo Lebenbaum, submits the following statement of points which he will rely upon in his appeal:

1. The Court erred in failing to award to appellant, Leo Lebenbaum, the entire balance of the funds in the registry, after deducting and ordering paid to appellants Gawzner the sum due to them for the Government's use and occupancy of the area not leased to Lebenbaum.

2. The Court erred in not separately finding the sum due appellants Gawzner for the Government's

use and occupancy of the [306] area not leased to Lebenbaum.

3. The Court erred in failing to find and decree that appellants, by contracts, stipulations, judgments and orders had completely abandoned the measure of market value and just compensation and had permanently fixed the sum of $113,704.00, together with the value of the improvements left by the Government and relinquished to the appellants, as the compensation, other than restoration damage, to be paid for rental.

4. The Court erred in denying Lebenbaum's motion to exclude appellants Gawzner from participation in the trial proceedings, except as to the value of the use and occupancy of the area not leased to Lebenbaum.

5. The Court erred in refusing to find and decree that its jurisdiction was limited to determining—

a) what interests the plaintiff had taken;

b) from whom they were taken;

c) what the appellants had fixed and agreed to be the compensation for such taking, after they had deducted and received their fixed and agreed compensation for restoration;

d) who was entitled to such compensation.

6. The Court erred in refusing to find and decree that it was without jurisdiction to try and determine the contract rights of appellants Gawzner, against appellants Lebenbaum, to collect rents under the lease during the plaintiff's occupancy of the leased premises, or to enforce payment thereof.

7. If the Court had jurisdiction to determine and enforce payment of the rental due from Lebenbaum to Gawzners under the lease, during the period of plaintiff's occupancy of the leased premises, it should have found and decreed that such rental was the minimum guarantee of $1500 per month as provided in paragraph three of the lease.

8. The Court erred in overruling Lebenbaum's objection to and in refusing to strike the answer of the witness Edw. H. Allen, to the question seeking his opinion as to the market or bonus value of the lessee's interest in the lease from the Gawzners to Lebenbaum.

9. The Court erred in overruling Lebenbaum's objection to and in refusing to strike the answer of the witness, Charles G. Frisbie, to the question seeking his opinion as to the market or bonus value of the lessee's interest in the lease from Gawzners to Lebenbaum.

PAUL COTE.
By /s/ PAUL R. COTE,

Attorney for Defendant and
Appellant Leo Lebenbaum.

[Endorsed]: Filed July 20, 1949. [308]

DEFENDANTS' EXHIBIT NO. 1
Lease

This Lease, made and entered into this 15th day of December, 1943, by and between Paul Gawzner

and Irene Gawzner, husband and wife, of the County of Santa Barbara, State of California, hereinafter called the Lessors, and Leo Lebenbaum, of Eureka, California, hereinafter called the Lessee.

Witnesseth:

That the Lessors, for and in consideration of the rents herein agreed to be paid by the Lessee, and all the other covenants, conditions and agreements herein agreed to be performed by said Lessee, do by these presents lease, let and demise unto the Lessee, and the Lessee does hereby lease, hire and take of and from said Lessors, for the term hereinafter specified, that furnished hotel known as Miramar Hotel and Bungalows, situated upon that certain real property in El Montecito, County of Santa Barbara, State of California, and particularly described as follows, to-wit:

> Parcel A: Beginning at the southeast corner of Jacob Oleson's land surveyed March 29, 1876; thence 1st north 1606 feet to the northeast corner of aforementioned tract; 2nd, east 176.39 feet to the northwest corner of Dayton's land; 3rd, south 495 feet; thence 4th, east 293.81 feet; thence 5th, south 478.37 feet more or less to a point in the center line of the Coast Highway at the northwesterly corner of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official Records of said County at page 4; thence 6th, north 70°16′ west along the center line of said Coast Highway 23.70

Defendants' Exhibit No. 1—(Continued)

feet; thence south 0°27′ west 327.38 feet to the beginning of a curve to the right having a central angle of 83°01′ and a radius of 40 feet; thence along said curve a distance of 57.96 feet to the beginning of a tangent to said curve; thence along said tangent south 83°28′ west 202.70 feet; thence south 4°03′ east to a point in the southerly line of Parcel Four of the above mentioned Gawzner deed; thence westerly along said southerly line of Parcel Four to the point of beginning.

Excepting, however, all that portion thereof lying north of the center line of the Coast Highway as now located.

Also Excepting that portion thereof lying within the lines of the strip of land known as the Southern Pacific right of way.

Also Excepting that portion thereof, if any, included within the lines of the tract of land quitclaimed to David S. Cook, Sr., by Emmeline Doulton, by deed dated December 19, 1903 and recorded in Book 98, at page 86 of Deeds, records of said County.

Also Excepting therefrom that portion thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in Book 552, at Page 275, Official Records of Santa Barbara County, California.

Parcel B: Lots 8, 9, 12, 19, 20, 21, 22, 23 and

Defendants' Exhibit No. 1—(Continued)

24 of Ocean Side subdivision, in said County of Santa Barbara, State of California, according to the map thereof recorded in Book 1, at page 29 of Maps and Surveys in the office of the County Recorder of said County and the following described portion of Lot 13 of said subdivision:

Beginning at the southeasterly corner of said Lot 13 in the center of Ocean Avenue; thence west along the south line of said Lot 13, 240.24 feet more or less to the southwesterly corner thereof; thence north along the west line of said lot 6.42 feet; thence east 138.54 feet; thence south 77°39′ east 14.02 feet; thence east 88.0 feet to a point in the easterly line of said lot in the center of Ocean Avenue; thence south along said east line 3.42 feet to the point of beginning.

Excepting from said Lots 21, 22 and 23, the westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Harriet Dorr Doulton, dated March 27, 1899 and recorded in Book 66, at page 427 of Deeds, records of said County.

Also Excepting from said Lot 24, the southerly and westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Mrs. H. M. A. Postley, dated January 31, 1899 and recorded in

Defendants' Exhibit No. 1—(Continued)

Book 66, at page 73 of Deeds, records of said County.

Also Excepting from said Lots 19 and 20 the portions thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in Book 552, at page 275, Official Records of Santa Barbara County, California.

Parcel C: Beginning at a point on the easterly line of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official Records of said County at page 4 said point being distant thereon south 0°32'30" west 232.10 feet from the northeasterly corner thereof; thence along said easterly line of Parcel Two south 0°32'30" west 96.12 feet to the southeasterly corner thereof; thence along the southerly line of said Parcel Two north 88°55' west 80.03 feet to the beginning of a curve to the right having a central angle of 89°22' and a radius of 25 feet; thence along said curve 38.99 feet to the beginning of a tangent to said curve; thence along said tangent north 0°27' east 51.10 feet; thence south 89°33' east 88.0 feet; thence north 0°27' east 19.0 feet; thence south 89°33' east 16.91 feet to the point of beginning.

Parcel D: A right of way for road purposes for the benefit of the lands described in Parcels A, B and C above, over the following land:

Beginning at the northwesterly corner of

Defendants' Exhibit No. 1—(Continued)

Parcel Two as described in the above mentioned Gawzner deed said corner being on the center line of the Coast Highway; thence along said center line north 70°16′ west 23.70 feet; thence south 0°27′ west 327.38 feet; thence south 89°33′ east 30.0 feet; thence north 0°27′ east 316.88 feet to a point in the center line of the Coast Highway; thence along said center line north 70°16′ west 8.08 feet to the point of beginning; including all of the improvements situated upon said property and all of the furniture, furnishings, tools, implements and other personal property used in the operation of said hotel, including, but without limiting the generality of the foregoing, all of the personal property included in that certain inventory and appraisal made by Fidelity Appraisal Company (West) currently herewith, copies of which are in the possession of the respective parties hereto and identified by their signatures, and which inventory by such reference is made a part hereof as though annexed hereto, and herein said parties do mutually agree as follows:

One: Term. That the term of this lease shall be five (5) years and fifteen (15) days and shall commence on the 15th day of December, 1943, and end on the 31st day of December, 1948; provided, however, that Lessee shall have, and he is hereby given, the option of renewing the lease upon the same terms as are herein set forth for an additional term of five (5) years, such option to be exercised

Defendants' Exhibit No. 1—(Continued)

on or before June 30, 1948, by notice in writing to said Lessors, and failure to give such written notice within such time shall constitute a waiver of such option of renewal.

Two: Use Of Premises. Said premises are hereby let and they shall be used by Lessee only for the purpose of carrying on the business of operating a hotel, with a cafe, bar and restaurant, and all of the other usual activities of hotels or resorts generally, including the operation of beach facilities, and the same shall be continuously operated as such under the name of "Miramar Hotel and Bungalows" or some other name featuring the word "Miramar."

Three: Rent. Said Lessee shall pay no rent for the balance of the month of December, 1943, but commencing with January 1, 1944, said Lessee shall pay to said Lessors as rent for said premises the following percentages of the gross business done on said leased premises as follows:

(a) Thirty-five (35) per cent of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges.

(b) Fifteen (15) per cent of the gross business from the sale of beer, wine and liquor, including soft drinks.

(c) Five (5) per cent of the gross business from the sale of all food.

Provided, however, that Lessee shall guarantee to said Lessors a minimum rental of One Thousand

Defendants' Exhibit No. 1—(Continued)

Five Hundred Dollars ($1500.00) per month. Said rentals shall be payable as follows: The minimum guaranteed rental of One Thousand Five Hundred Dollars ($1500.00) shall be paid monthly in advance on the first day of each and every month of said term, commencing February 1, 1944, (receipt being hereby acknowledged of the sum of $1500.00 covering the guaranteed rental for the month of January, 1944), subject to the averaging of the percentage rentals above provided for as follows: on or before the 10th day of each month, commencing with the 10th day of February, 1944, the percentages of the gross business above provided for the preceding month shall be computed and if such percentage rental shall be in excess of the One Thousand Five Hundred Dollars ($1500.00) guaranteed rental paid for the preceding month, said excess shall be paid to said Lessors forthwith. If, however, the amount paid by Lessee to Lessors as rental for any month, including both the guaranteed rental and the percentage rental, shall exceed One Thousand Five Hundred Dollars ($1500.00), the excess over said guaranteed rental may be applied by Lessee as a credit on the minimum guaranteed rental for any subsequent month or months in the same calendar year in which the percentage rental for that month or months is less than One Thousand Five Hundred Dollars ($1500.00) and if in any month the guaranteed rental shall exceed the amount of percentage rental, then the amount of such excess may be de-

Defendants' Exhibit No. 1—(Continued)

ducted and retained by Lessee from the amount of percentage rental payable to Lessors in any subsequent month or months in the same calendar year in which and to the extent the amount of percentage rental exceeds One Thousand Five Hundred Dollars ($1500.00), to the end that said Lessee shall not pay more rental for any year of the term of said lease, nor shall said Lessors receive less for any such year, than Eighteen Thousand Dollars ($18,000.00) or the percentages of gross business done during the year, as above provided, whichever is greater. If during any calendar year the percentage rental payable hereunder shall reach the sum of Forty-Five Thousand Dollars ($45,000.00), the percentages of gross business thereafter payable as rent for the balance of said calendar year shall be reduced to the following:

(a) Thirty (30) per cent of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges.

(b) Ten (10) per cent of the gross business from the sale of beer, wine and liquor, including soft drinks.

(c) Five (5) per cent of the gross business from the sale of food.

In computing the percentages of gross business as above provided, any and all sales or direct taxes now imposed by the State or Federal Government on commodities or services sold or furnished by Lessee in the operation of said hotel, as well as any

Defendants' Exhibit No. 1—(Continued)

additional or other sales or similar taxes that may be hereinafter imposed by the State, Federal or any municipal government, and which are charged directly to the patron or customer and not absorbed by the Lessee, shall be deducted from gross business before the making of such computation.

In connection with the percentage rentals, it is agreed that if Lessee shall lease any rooms in said hotel on the so-called "American Plan" or with meals included in the quoted rate, no more than Three Dollars ($3.00) per person per day shall, as between the Lessors and Lessee hereunder, be allocated for food; provided, however, that either Lessors or Lessee may request a revision in said allocation by notice to the auditor hereinafter specified, whose decision shall be final and binding. Further, all credit losses shall be borne by Lessee and shall not reduce the percentage rental above provided. Further in this connection, complimentary accommodations furnished by Lessee to the trade shall not be considered in computing such percentage rentals.

Said Lessee shall keep his hotel accounting in accordance with the hotel accounting system of Messrs. Horworth & Horworth, auditors, or such other system as may be approved by the parties hereto, and shall keep and maintain adequate books of account showing the totals of all gross business done on said premises and shall, on or before the 10th day of each and every month, furnish to said

Defendants' Exhibit No. 1—(Continued)

Lessors adequate statements showing said gross business, divided in accordance with the schedule of rental above specified. Likewise, a complete audit shall be had of the books of account of said Lessee, on a quarterly basis, commencing March 31, 1944, made by said Horworth & Horworth, or other independent auditors satisfactory to the parties hereto, the expense of which audits shall be borne by Lessee. Further in this connection, Lessee shall furnish Lessors with a daily report of business done by him in sair hotel.

Four: Possession. Possession of said premises shall be delivered to said Lessee on midnight of December 15, 1943.

Five: Repairs. Lessors covenant and agree to keep the roof, foundations, structural supports and outer walls of all buildings on said leased premises, exclusive of plate glass or other windows, in good order and repair and properly painted, and all other costs, charges and expenses of upkeep, repair and replacement of said leased property, including the care of lawns, flowers, shrubbery and trees, shall be at the sole cost, charge and expense of Lessee. Lessors' obligation so to keep in repair the roof and outer walls shall only come into being upon receiving written notification from Lessee that such repairs are needed, and Lessors shall have a reasonable time thereafter in which to make such repairs.

Six: Improvement Fund. That as a further consideration for this lease, Lessee shall forthwith and

Defendants' Exhibit No. 1—(Continued)

contemporaneously with the execution hereof deposit the sum of Twenty Thousand Dollars ($20,000.00) with County National Bank and Trust Company of Santa Barbara to be drawn upon jointly by the parties hereto for the making of permanent improvements upon said leased premises as agreed upon by said parties. In this connection, it is the intention of said parties that all of said fund shall be used and invested in said leased premises as soon after the commencement of the term hereof as possible, to the end that such improvements shall increase the income producing possibilities of said leased premises, but any delay in the making of such improvements and investments of said fund shall not free said fund from the primary purpose contemplated by this paragraph. Further in this connection, the parties now contemplate the moving of certain cottages from one location to another on said leased premises and the making of various improvements to the beach forming a part of said leased premises, including the building of cabanas, and the making of other income producing improvements and additions, but realize that certain of said improvements may not now be made because of the rules and regulations of the Office of Price Administration, the War Labor Board and other Federal agencies. However, at such time or times as, and as soon as, the improvements contemplated and proposed from time to time by Lessors, and approved by Lessee, can be made, the same shall be

Defendants' Exhibit No. 1—(Continued)

made from said fund so above created in the name of said Lessee but under the supervision of said Lessors. Any and all improvements placed upon said leased premises pursuant to this paragraph shall become the property of said Lessors as though existing and in being on said leased premises at the commencement of the term hereof. Any balance in said account from time to time not theretofore expended for improvements upon said leased premises shall be maintained in said account as security to said Lessors for the performance of the terms of this lease by Lessee; but should said Lessors sell said leased premises prior to the date that the whole of said fund has been invested in said premises, any part remaining unspent at the time of such sale shall revert to Lessee free of any obligation hereunder. Any part of said fund not used for improvements upon said premises during the term of this lease, provided said premises have not been sold by said Lessors, shall revert to and become the property of Lessors, to all intents and purposes as though the same had been paid as an additional rental for the execution of this lease.

Seven: Furnishings Replacement Fund. That as a further consideration for said lease, said Lessee shall monthly, commencing with February, 1944, covering the business done in the month of January, 1944, and monthly thereafter during each and every month of said term, deposit into a special account

Defendants' Exhibit No. 1—(Continued)

with County National Bank and Trust Company of Santa Barbara in the names of himself and Lessors three (3) per cent of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges and from the sale of beer, wine and liquor, including soft drinks, but less sales tax as provided in Paragraph Three hereof, done by him the preceding month, as a fund for the replacement of furnishings, furniture, carpets, heaters and/or all other personal property covered by this lease; provided, however, that not more than Three Thousand Dollars ($3000.00) per calendar year shall be required to be placed in said fund. In this connection, in addition to the obligation to maintain and repair imposed on Lessee in Paragraph Five hereof, it is the intention of the parties that said Lessee shall maintain all of the furniture, furnishings and personal property leased hereby in the same condition as the same were in at the commencement of the term, and, to that end, as any of said personal property shall, by use or otherwise, be rendered unrepairable, the same shall be replaced from said fund so created, to the end that, upon the termination of this lease, said Lessors shall receive back furniture, furnishings and other personal property of as good character and value as the same is in at the commencement of this lease. Any and all withdrawals upon such fund shall be made by all the parties hereto but said Lessee shall not unreasonably withhold his consent to the replace-

Defendants' Exhibit No. 1—(Continued)

ment and renewal of any articles of personal property suggested for renewal by said Lessors. Any and all personal property purchased pursuant to the terms of this paragraph shall be and remain the property of said Lessors, to all intents and purposes as though in existence at the time of the execution of this lease, and any such renewals or replacements shall be subject to the obligation of said Lessee to maintain and repair, or further replace, pursuant to this paragraph. Upon the termination of this lease, any and all of said fund so remaining that shall not have theretofore been used for the repair and replacement of personal property covered by this lease shall be used to properly repair and restore said personal property to the state it was in at the commencement of the term hereunder, and any balance then remaining shall revert to and become the property of Lessee, subject to the adjustment of any indebtedness from said Lessee to said Lessors.

In connection with the expenditures of the fund provided for in Paragraph Six, it is contemplated that, as various improvements are made, Lessee will be required to provide furniture and furnishings for use therein. Such furniture and furnishings shall be provided by Lessee from his own funds, separate from either the fund provided for in Paragraph Six or the fund provided for in this Paragraph Seven, but shall remain on and become

Defendants' Exhibit No. 1—(Continued)

the property of Lessors on the termination of this lease. Further in this connection, it is the intention of the parties that additions of furniture or furnishings to the hotel facilities now available, but not those subsequently erected, shall be made from the fund provided for in this Paragraph Seven.

Eight: Garage. It is understood that Lessors own a garage building adjoining on the south and east the property covered by this lease. While said lease does not cover said garage, said Lessors anticipate that, until they shall elect to improve or otherwise use said garage building, the same may be used by Lessee rent free for the use of guests of said hotel. In the event said Lessors shall elect to improve and alter said garage building, so that the same may be used as a motion picture theatre, bowling alley, billiard hall, pool room, card room or any other type of amusement center, then they shall, as part of such improvement, so alter the basement of said garage building that the same may be used as a garage, and said basement shall, from that time on, be available to said Lessee rent free for the storage of cars of his guests in said hotel, and, at the request of Lessee, will at that time, by proper instrument in writing, be made a part of the premises covered by this lease. Said Lessors shall be free to operate, lease or contract for the use of the main floor of said garage building after such improvement, provided, however, that any business conducted therein shall not, either directly or in-

Defendants' Exhibit No. 1—(Continued)

directly, compete with the business operated by Lessee pursuant to this lease and shall be operated in such a manner as not to be detrimental to the general neighborhood or to the business conducted by Lessee pursuant to this lease.

Nine: Public Utility Charges And Other Bills. Said Lessee covenants, promises and agrees to pay all charges or rates for water, gas, power, electricity or other public utilities used or consumed in or about said premises; and also agrees to pay promptly all accounts incurred by him in the operation of said leased premises.

Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa Barbara, County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall be condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings

Defendants' Exhibit No. 1—(Continued)

upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other.

Eleven: Destruction Of Premises. If fire, earthquake or other casualty shall destroy or damage the improvements on said leased premises, the parties agree:

(a) That if such destruction or damage shall be minor in nature, Lessors shall, as soon as the insurance money is available, promptly repair the same and Lessee shall be entitled to no rebate of rent during such repair period.

(b) That if such destruction or damage shall destroy, damage or render unfit for occupancy less than fifty (50) per cent of the rentable rooms in said hotel, then Lessors shall, as promptly as possible after payment of the insurance money on such loss, repair and rebuild the same and replace any personal property destroyed, and during the repair period Lessee shall be entitled to a reduction in the minimum guaranteed rental in the ratio that the number of rentable rooms so destroyed, damaged or

Defendants' Exhibit No. 1—(Continued)

rendered unfit for occupancy bears to the total number of rentable rooms.

(c) That if such destruction or damage shall destroy, damage or render unfit for occupancy fifty (50) per cent or more of the rentable rooms of said hotel, then Lessors may either (1) repair and rebuild the same and replace any personal property destroyed as promptly as possible after the payment of the insurance money on such loss or (2) terminate and cancel this lease. If Lessors shall elect to so repair and rebuild, then during the period of reconstruction the minimum guaranteed rental shall be entirely waived by Lessors.

(d) That if such destruction shall be complete and total and shall cover all of the improvements on said leased premises, then this lease shall ipso facto cease and terminate with destruction.

(e) That said Lessee shall not, other than the waivers and rebates hereinabove provided for, be entitled to any compensation or damage on account of any inconvenience in making any of said repairs or replacements.

Twelve: Assignments. Said Lessee further covenants and agrees not to assign this lease or sub-let the whole or any portion of the demised premises, except in the ordinary course of his business of conducting a hotel, without the written consent of said

Defendants' Exhibit No. 1—(Continued)

Lessors first had and obtained provided, however, that said Lessee may assign said lease to either a corporation in which he or his wife holds the majority stock or a limited partnership in which he is the general partner, or a general partnership in which both he and his wife are the general partners. Any assignment made hereunder shall be in writing and the assignee shall, by provision in said assignment, assume all obligations of this lease, a copy of which assignment, as executed, must be delivered to Lessors before it is effective; and when these conditions have been complied with, the assignment shall become effective, provided, however, that such assignment by Lessee shall not in any way relieve or release him from liability hereunder.

Thirteen: Waste. Said Lessee further covenants and agrees that he will not commit or suffer any damage or waste upon said premises, and that at the end of said term, or any renewal thereof, or any sooner termination of this lease, he will quit and surrender up peaceable possession of said premises to said Lessors in as good order and condition as the same were in at the commencement of said term, reasonable use and wear thereof and damage by the elements excepted.

Fourteen: Compliance with Ordinances. That said Lessee will not use, or suffer or permit any person to use, in any manner whatsoever, the said premises nor the buildings or improvements thereon or any portion therof for any purpose tending to

Defendants' Exhibit No. 1—(Continued)

injure the reputation of the premises or of the neighborhood property or to constitute a nuisance, or for any purpose or use in violation of the laws of the United States or of the State of California or of the Ordinances and Regulations of the County of Santa Barbara; and that he will obtain all permits or licenses required by such laws, and pay all fees and expenses incurred therefor; and that all sidewalks, spaces and excavations either under the sidewalks or adjacent to said building shall be kept in good, safe and secure condition, and all alleys, passageways on or adjoining said premises shall be kept in a clean and safe condition, and that all cost and expense therefor shall be paid and discharged by the said Lessee; and that the said Lessee shall hold the Lessors and said property free and harmless from any cost, loss, damages, attorneys' fees, expense or other liability for any claims or demands arising out of the use of said premises or the violation of any law in connection therewith, or for any injury to any person arising out of the use and occupation of said premises, or any other claim or demand whatsoever in connection therewith.

Fifteen: Improvement by Lessee. Said Lessee shall not make any structural or other alterations upon said leased premises without the written consent of said Lessors first had and obtained. Any and all such alterations so proposed to be made by Lessee shall be approved in writing by Lessors, but shall be paid for by Lessee, unless the parties other-

Defendants' Exhibit No. 1—(Continued)

wise agree, and shall remain on the premises for the benefit of said Lessors upon the termination of this lease. In this connection, should said Lessee make any such alterations, with the consent of the Lessors, he agrees to hold said Lessors harmless from the claims of any laborers or materialmen in connection therewith and said Lessors are given full permission to post notice of non-responsibilty upon said property as provided in the Mechanic's Lien Law of the State of California.

Sixteen: Public Liability. Said Lessee further covenants and agrees that he will protect and fully indemnify and save harmless said Lessors from and against any and all damage, loss, costs, charges and demands whatsoever, which said Lessors may sustain or incur or be subjected to, that may be directly or indirectly caused by or due to or grow out of the occupation of said leased premises by said Lessee. In this connection, said Lessee shall carry public liability insurance, with a reliable company, in limits of not less than One Hundred Thousand Dollars ($100,000.00) for injuries to one person and Three Hundred Thousand Dollars ($300,000.00) for injuries to more than one person, which policy by its terms shall be made for the protection of the Lessors as well as the Lessee and shall cover all public liability risk upon said leased premises.

Seventeen: Insurance, Taxes and Assessments. Said Lessors shall at all times keep the improvements on said leased premises properly insured

Defendants' Exhibit No. 1—(Continued)

against fire loss with such companies as they may elect in an amount or not less than One Hundred Thousand Dollars ($100,000.00) and the personal property in an amount not less than Sixty Thousand Dollars ($60,000.00), and shall also pay before delinquent, all taxes and assessments that may be levied upon said leased premises. In the event said Lessors shall default in the maintenance of such insurance or in the payment of taxes and assessments, Lessee may, at his option, pay the same, and deduct the amounts paid from future rentals due said Lessors.

Eighteen: Lessors' Inspection. It is understood and agreed that said Lessors reserve the right to enter into and upon said leased premises, either personally or by their agents or attorneys, for the purpose of making repairs, alterations or improvements upon the leased premises, without, however, hereby enlarging the obligation to repair hereinabove set forth, or for the purpose of inspecting the premises hereby leased. In this connection, it is understood and agreed that said Lessors may, at any time, during business hours, inspect the books of account of said Lessee, as well as all cash registers and other records showing the gross sales or gross business done on said leased premises, and said Lessee shall retain all cash register tapes and cards until inspection by Lessors, but not exceeding three (3) years.

Nineteen: Competing Business. It is understood that the leased premises are a portion of larger

Defendants' Exhibit No. 1—(Continued)

holdings of said Lessors and that said Lessors contemplating the sale or leasing of the property adjoining said leased premises. In this connection, said Lessors covenant and agree for themselves, their heirs, executors, administrators, tenants, grantees and assigns that, during the term of this lease, or any renewal thereof, no competing business shall be maintained upon said adjoining premises owned by said Lessors and further agree that if they shall lease or sell any of said adjoining property, they will, either in the instrument of lease or transfer, or by separate instrument, obtain from such Lessee or Vendee a contract running with the land that such Lessee or Vendee, and his successors, will not conduct a competing business on the adjoining premises during the term of this lease or any renewal thereof.

Said Lessors further covenant and agree that they will not, during the term of said lease, or any renewal thereof, engage in the hotel business in the County of Santa Barbara.

Twenty: Assumption of Contracts. Said Lessee agrees to assume the obligation imposed on said Lessors in the following contracts incurred by them in connection with the operation by them of the hotel on said leased premises, to-wit:

(a) Agreement dated January 25, 1943, with Electrical Products Company;

(b) Agreement dated April 5, 1943, with Cooks Co., Inc.;

Defendants' Exhibit No. 1—(Continued)

(c) Agreement dated July 10, 1943, with The Diamond Match Company;

(d) Agreement dated June 24, 1943, with Lion Match Company, Inc.;

and agree to hold said Lessors harmless from the same on and after December 15, 1943.

Twenty-one: Bankruptcy. It is further understood and agreed that if said Lessee shall be adjudicated as bankrupt or shall make any assignment for the benefit of creditors, or shall take any other steps toward a liquidation in insolvency or should his business be attached and the same not released from attachment within five (5) days, or should any sale or attempted sale of the leasehold interest hereby created be attempted to be made under or by virtue of any execution or other judicial process, said Lessors shall have the right to immediately terminate this lease and no person shall have the right to use, possess or occupy said premises by virtue of any such adjudication, insolvency, assignment or sale.

Twenty-two: Default. It is understood and agreed that if Lessee shall be in default in the payment of rent for a period of ten (10) days or shall make default in any of the other terms and covenants hereof and shall fail to remedy such default within ten (10) days after receiving written notice from Lessors specifying such default, said Lessors may, at their option: (1) re-enter the said premises, either with or without process of law, and re-

Defendants' Exhibit No. 1—(Continued)

possess themselves of the same, either personally or by receiver, and re-let the same or any part thereof at such rental and upon such terms and conditions as they may deem proper, and apply the proceeds thereof, less the expenses, including the usual agents' commissions so incurred, upon the amount due from said Lessee hereunder, and said Lessee shall be liable for any deficiency, and such taking of possession of said premises and such reletting shall not operate as a termination of this lease unless said Lessors so elect, such election to be evidenced by written notice to said Lessee; (2) declare the term of this lease ended, in which event said Lessee shall peaceably and quietly surrender and deliver up possession of said leased property to Lessors; or (3) pursue any other remedy or remedies afforded them at law or in equity.

Twenty-three: Waiver. It is further understood and agreed that any waiver, express or implied, by said Lessors, of any breach by the Lessee of any covenant of this lease shall not be, nor be construed to be, a waiver of any subsequent breach of a like or other covenant of this lease. In the event either party hereto shall file an action against the other for the enforcement or construction of any term of said lease, the losing party shall pay all reasonable attorneys' fees expended or liability incurred by the other party in such action, and such attorneys' fees may be taxed as costs.

In the event the Lessors shall, without fault on

Defendants' Exhibit No. 1—(Continued)

their part, be made party to any litigation concerning this lease, brought against said Lessee, then said Lessee shall pay all costs and attorneys' fees incurred by said Lessors in the defense of any such litigation.

Twenty-four: Notices. All notices to be given by said Lessors to said Lessee may be given by sending the same by registered mail, postage prepaid, addressed to said Lessee at Miramar Hotel, Santa Barbara, California.

All notices to be given by Lessee to Lessors may be given by sending the same by registered mail, postage prepaid, addressed to the Lessors in care of County National Bank and Trust Company, 1000 State Street, Santa Barbara, California.

The Lessors and the Lessee may change the places of giving notice above specified by written notice of any change of address so desired.

Twenty-five: Protection of Title. The said Lessee agrees to protect said premises from the acquisition by the public of any easement or right of way over the same by user and, in the event any portion of said premises is used as or converted into a passageway or entrance, then said Lessee agrees, at such periods of time as may be sufficient under the laws of the State of California to prevent the acquisition of any rights in the public, to erect such obstructions therein for such time as the law may require, and, in the event the said Lessee does not so protect the said property by periodically

Defendants' Exhibit No. 1—(Continued)

erecting such obstructions, gates or other evidences of private ownership, the said Lessors are hereby given the right to enter upon said premises and to so place such obstructions, gates or other evidences of private ownership, provided, however, that any such gates shall not be maintained longer than twenty-four (24) hours at any one time and at intervals not more frequent than once each year.

Twenty-six: Liquor Licenses. As part of the consideration of said Lessee entering into this lease, said Lessors are contemporaneously herewith transferring to said Lessee, so that he may engage in the sale of beer, wine and spirits on said premises, their liquor licenses issued by the State of California. It is understood and agreed that said licenses shall not be sold, assigned, transferred or encumbered by said Lessee and that, upon the expiration of this lease, or any renewal thereof, or upon the termination thereof, said Lessee shall re-assign and transfer back said licenses to said Lessors, the parties hereby understanding that said licenses are part and parcel of the hotel now and hereafter to be operated upon said premises. Said Lessee shall pay all license fees and other charges in connection with said liquor licenses during the term of this lease, or any renewal thereof. In this connection, said Lessee shall be under no liability to Lessors if said licenses or any of them shall be cancelled by the State of California without fault or guilt on the part of said Lessee.

Defendants' Exhibit No. 1—(Continued)

Twenty-seven: First Refusal of Purchase. Said Lessee shall have, and he is hereby given, the first refusal of purchasing said premises from said Lessors, as follows: In the event said Lessors shall contemplate selling said leased premises, or any part thereof, and should receive a bona fide offer for the purchase thereof, the terms of said offer shall be communicated in writing to said Lessee, who shall have ten (10) days thereafter in which to enter into an agreement with said Lessors for the purchase of said premises at the price and upon the terms contained in the communication to him, failing in which, said Lessors may then sell in accordance with the offer theretofore received by them and communicated to said Lessee; but such sale shall be made subject to this lease. In this connection, it is understood and agreed that the first refusal given by this paragraph shall not apply as against any subsequent transferee thereof, in the event said Lessee has failed to exercise the option herein granted at the time of sale by Lessors.

Twenty-eight: Warranties. The said Lessee states that he has made an independent investigation of said leased premises and of the business now being conducted thereon, and is entering into this lease solely as a result of his own investigation of the whole transaction and not as a result of any warranties, representations or inducements made by said Lessors, other than in this agreement con-

Defendants' Exhibit No. 1—(Continued)

tained or in any other agreements in writing made concurrently herewith.

Twenty-nine: Construction. It is understood and agreed that this lease shall not constitute, nor be construed to constitute, any partnership as between the Lessors and the Lessee but is intended solely as a lease in which rental is partly measured by the gross business of the Lessee.

Thirty: Recordation. It is understood that this lease shall not be recorded in toto but, in lieu thereof, there shall be recorded in the Office of the County Recorder of the County of Santa Barbara, California, a memorandum of the lease setting forth the fact of the making thereof. Upon the expiration of the term hereof, or any renewal, or upon the termination of this lease in any of the manners provided herein, Lessee will, with his wife, execute and deliver to Lessors a proper instrument clearing the record title of his interest as Lessee pursuant to said recorded memorandum.

Thirty-one: Peaceable Possession. It is understood and agreed that the Lessee, so long as he shall pay his rent and keep and perform the covenants and agreements herein contained on his part to be kept and performed, shall and may peaceably and quietly hold and enjoy the said leased premises for the term aforesaid, without let or hindrance on the part of the Lessors, or any one claiming by or through Lessors.

This lease, executed in duplicate, shall inure to

Defendants' Exhibit No. 1—(Continued)

the benefit of and bind the parties, their respective heirs, executors, administrators and assigns.

In Witness Whereof, said parties have hereunto set their hands the day and year first above written.

/s/ PAUL GAWZNER,
/s/ IRENE GAWZNER,
Lessors.

/s/ LEO LEBENBAUM,
Lessee.

DEFENDANT'S EXHIBIT NO. 2
Notice of Termination of Lease

To: Leo Lebenbaum:

Whereas, on the 15th day of December, 1943, the undersigned, Paul Gawzner and Irene Gawzner, as lessors, and you, as lessee, executed a certain written lease dated December 15, 1943, upon certain premises in El Montecito, County of Santa Barbara, State of California, commonly known and described as Miramar Hotel and bungalows, including the improvements situated upon said property, and all furniture, furnishings, tool implements, and other personal property used in the operation of said hotel, all as more particularly described in said written lease to which reference is hereby made for further particulars; and

Whereas, said lease was for the term of five (5) years and fifteen (15) days, commencing on the

Defendants' Exhibit No. 2—(Continued)

15th day of December, 1943, and contained an option to renew the same for an additional term of five (5) years upon the said terms and conditions as set forth in said lease; and

Whereas, Clause Thirty-one of said lease provides in effect that the tenant shall be entitled to the quiet and peaceable possession of the leased premises for the term thereof so long as the tenant shall not be in default; and

Whereas, Paragraph Ten of said lease provides as follows:

> "Condemnation. The Lessee has hertofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa Barbara County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall by condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all

Defendants' Exhibit No. 2—(Continued)

assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

And,

Whereas, the undersigned are the owners of the fee title to said leased premises and personal property; and

Whereas, on or about July 10, 1944, the undersigned were notified that Henry L. Stimson, Secretary of War of the United States of America, and requesting officer of United States of America, selected said leased premises and personal property and certain other premises owned by the undersigned for use for military purposes under authority of the Second War Powers Act (Act of Congress approved March 27, 1942, Public Law 507—77th Congress); and

Defendants' Exhibit No. 2—(Continued)

Whereas, on July 10, 1944, pursuant thereto, the United States of America, through the said Secretary of War and the army of the United States, took possession of all of said leased premises and personal property for said purposes; and

Whereas, on or about July 10, 1944, there was filed in the District Court of the United States, in and for the Southern District of California, Central Division, a complaint in condemnation, entitled "United States of America, plaintiff, v 21 Acres of Land, etc. et al.," and numbered in the records of said Court No. 3752-H Civil, which complaint covers the said leased premises and personal property and other premises owned by the undersigned; and

Whereas, said complaint recites as follows:

> "That the estate or interest to be taken in the hereinabove referred to and hereinafter described property is for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the existing national emergency at the election of the United States of America, notice of which election shall be filed in the above entitled proceeding at least thirty days prior to the end of the term hereby taken or subsequent extensions thereof. . . ."

And

Whereas, by reason of the foregoing, it has be-

Defendants' Exhibit No. 2—(Continued)

come impossible for the undersigned to perform in accordance with the terms of said lease, and particularly without limiting the generality of the foregoing, to keep the tenant in quiet and peaceable possession; and

Whereas, the consideration of said lease, to-wit, the possession of said premises, has failed without fault or act of the undersigned; and

Whereas, the undersigned by reason of Paragraph Ten of said lease is entitled to cancel and terminate the same; and

Whereas, by reason of the law and the facts, the undersigned is entitled to cancel and terminate said lease.

Now Therefore, by reason of the premises You Are Hereby Notified that said lease is cancelled and terminated, and that said cancellation and termination shall be effective thirty (30) days after service of this notice upon you.

This notice is being served upon you by registered mail in accordance with Paragraph Twenty-four of said lease.

Dated: August 4, 1944.

/s/ PAUL GAWZNER,
/s/ IRENE GAWZNER.

DEFENDANTS' EXHIBIT A

Leo Lebenbaum, Lessee
Miramar Hotel
Santa Barbara, California

Financial Statement
Final

[Letterhead]

Horwath & Horwath
Accountants and Auditors

Subway Terminal Building
417 South Hill Street
Los Angeles, Calif.

December 6, 1944

Mr. Leo Lebenbaum, Proprietor,
Miramar Hotel
Santa Barbara, California

Dear Sir:

From data which you submitted we have revised our report of October 6, 1944 covering operations for the first fifteen days of July, 1944 and the period January 1 to July 15, 1944.

The revised report submitted herewith exhibits a balance sheet as at October 1, 1944 and a general profit and loss statement with supporting schedules for the periods first above mentioned.

The exhibits and schedules are listed in an accompanying index.

The only changes effected, recording inventories

you reported to us, resulted in a reduction in cost of beverages sold for the half month and year to-date and an increase in other income arising from the sale of general supplies.

Other items indicated on your report on inventories and sales to the government has been taken into account in our previous report.

We did not examine into compliance with wartime laws and regulations relating to salary and wage adjustments, price ceilings, rationing, priorities and similar restrictions.

Very truly yours,

HORWATH & HORWATH.

Our reports and certificates are issued with the understanding that they will not be published in whole or in part, nor used in connection with the issuance of any securities, without our written consent.

Defendant's Exhibit A—(Continued)

EXHIBIT A
LEO LEBENBAUM, LESSEE
Miramar Hotel
Balance Sheet
as at October 1, 1944
ASSETS

Current Assets			
Cash on Deposit—First National Bank		$ 3,199.60	
Accounts Receivable			
Trade Vendors—Schedule A-1	$1,982.90		
Collection of Internal Revenue	27.73		
Paul Gawzner	40.16		
Advances to Improvement Fund	152.32		
Returned Checks	265.00	2,468.11	
Inventories			
Beverages	$2,430.00		
Food, etc	882.00	3,312.00	
Deposits			
Southern California Edison Company	$ 350.00		
Montecito Water District	5.00		
Chlorine Cylinders	61.50	416.50	
Total Current Assets			$ 9,396.21
Restricted Funds on Deposit			
Leasehold Improvements		$ 16.95	
Furnishings Replacement		2,250.00	2,266.9[illegible]
Other Assets			
Unamortized Leasehold Cost		$17,685.94	
Unamortized Leasehold Improvements		2,997.51	20,683.4[illegible]
Prepayments—Schedule A-2			673.3[illegible]
Total			$33,020.0[illegible]

Defendant's Exhibit A (Continued)

LIABILITIES AND CAPITAL

[In Pencil] : 1944 July 1—July 15 and Jan. 1—July 15

Current Liabilities			
Accounts Payable—Nade—Schedule A-3		$ 1,249.92	
Sales Tax Collected		73.76	
Loan Payable—Wells Fargo Bank		18,500.00	
Accruals			
Payroll Taxes	$ 135.23		
Rent	1,336.60		
Compensation Insurance	314.71		
Accountant Fees	350.00	2,136.54	
Total Current Liabilities			$21,960.22
Reserve for Leaschold Improvements			16.95
Capital			
Balance December 31, 1943		$12,160.34	
Add			
Net Profit Calendar Year 1944 To-Date		8,482.67	
Total		$20,643.01	
Deduct			
Proprietors' Withdrawals		9,600.18	
Net Worth			11,042.83
Total			$33,020.00

Defendant's Exhibit A—(Continued)

SCHEDULES A-1, A-2, A-3

LEO LEBENBAUM, LESSEE

Miramar Hotel

SCHEDULE A-1

ACCOUNTS RECEIVABLE—TRADE VENDORS

Lion Match Company		$ 27.12
Julliard Cockroft		182.83
Pepsi-Cola Company		14.65
Kayco		30.00
Johnson and Higgins		300.00
Eng. Skell		36.90
Santa Barbara Distributing Company		89.96
U. S. Army		
Food, etc	$801.44	
General Supplies	500.00	1,301.44
Total		$1,982.90

SCHEDULE A-2

PREPAYMENTS

Unexpired Insurance		$249.75
Licenses and Taxes		196.10
Personal Property Tax		80.59
Prepaid Advertising		
Outdoor	$11.29	
Magazine	2.10	13.39
Telephone		81.66
Dues		51.90
Total		$673.39

SCHEDULE A-3

ACCOUNTS PAYABLE—NADE

Pacific Coast Publishing Company	$ 17.40
Banks Typewriter Exchange	5.00
News Press Publishing Company	25.00
Oets Hardware Company	491.64
Santa Barbara Glass Company	7.18
Horwath & Horwath	409.60
Barker Bros.	155.55
Diamond Match Company	20.00
Vomkitts	1.69
Los Angeles Examiner	53.58
Dohrman Hotel Supply	3.28
Jean Schenck	60.00
Total	$1,249.92

ndant's Exhibit A—(Continued)

EXHIBIT B

LEO LEBENBAUM, LESSEE
Miramar Hotel
General Profit and Loss Statement

	Schedule Number	July 1 to July 15, 1944 Net Sales	Cost of Sales	Payroll	Other Expenses	Profit or Loss	January 1 to July 15, 1944 Net Sales	Cost of Sales	Payroll	Other Expenses	Profit or Loss
ated Departments											
ms	B-1	$ 6,084.36		$1,468.56	$ 671.24	$3,944.56	$ 60,196.42		$12,891.39	$ 6,815.32	$40,489.71
d	B-2	1,966.12	$ 442.99	729.93	316.82	476.38	22,152.32	$ 8,594.49	7,857.29	3,919.99	1,780.55
verages	B-3	5,087.84	969.75	516.83	922.39	2,678.87	58,418.73	16,903.94	4,852.81	9,709.03	26,952.95
ar Stand	B-4	140.60	45.00			95.60	1,145.53	891.18			254.35
phone	B-5	289.02	312.85			— 23.83	2,868.54	2,784.08			84.46
otal Operated Departments		$13,567.94	$1,770.59	$2,715.32	$1,910.45	$7,171.58	$144,781.54	$29,173.69	$25,601.49	$20,444.34	$69,562.02
Income	B-6	1,763.88				1,763.88	2,250.17				2,250.17
s Operating Income						$8,935.46					$71,812.19
tions From Income											
ministrative and General Expenses	B-7			$ 240.83	$ 893.66				$ 2,359.43	$ 6,850.94	
dvertising and Business Promotion	B-8				417.71					1,948.09	
ht, Light and Power	B-9				144.96					4,838.28	
otal Deductions				$ 240.83	$1,456.33	1,697.16			$ 2,359.43	$13,637.31	15,996.74
House Income, Expense and Profit											
ore Repairs and Maintenance		$15,331.82	$1,770.59	$2,956.15	$3,366.78	$7,238.30	$147,031.71	$29,173.69	$27,960.92	$34,081.65	$55,815.45
as and Maintenance	B-10			766.58	1,338.18	2,104.76			7,419.02	6,241.27	13,660.29
House Income, Expense and Profit		$15,331.82	$1,770.59	$3,722.73	$4,704.96	$5,133.54	$147,031.71	$29,173.69	$35,379.94	$40,322.92	$42,155.16
Taxes and Insurance	B-11					2,911.26					30,904.53
fi Before Interest and Amortization						$2,222.28					$11,250.63
rst	B-11					48.04					— 365.65
fi Before Amortization						$2,174.24					$10,884.98
ization of Leasehold Cost and nrovements	B-11					193.31					2,402.31
Tofit—Exhibit A						$1,980.93					$ 8,482.67

[In Pencil] : "Peak" months of this business are July, Aug., Sept.

Defendant's Exhibit A—(Continued)

SCHEDULE B-1

LEO LEBENBAUM, LESSEE
Miramar Hotel
Departmental Profit and Loss Statement
ROOMS

	Amounts		Percentages	
	July 1 to July 15, 1944	Year To-Date	July 1 to July 15, 1944	Year To-Date
Gross Sales	$6,154.36	$62,220.80	101.15%	103.36%
Allowances	70.00	2,024.38	1.15	3.36
Net Sales	$6,084.36	$60,196.42	100.00%	100.00%
Departmental Expenses				
Salaries and Wages	$1,468.56	$12,891.39	24.14%	21.42%
Employees' Meals	134.65	1,309.62	2.21	2.18
Laundry	209.60	2,632.85*	3.44	4.37
Dry Cleaning		62.40		.10
Uniforms		1.48		
Cleaning Supplies	31.79	245.25	.52	.41
Printing and Stationery		75.43		.12
Decorations		22.41		.04
Guest Supplies	68.73	677.62*	1.13	1.13
Commissions		164.45		.27
Keys		89.16		.15
Linen	213.97	1,296.00*	3.52	2.15
Contract Cleaning	12.50	165.75	.21	.28
Miscellaneous		72.90		.12
Total Expenses	$2,139.80	$19,706.71	35.17%	32.74%
Departmental Profit	$3,944.56	$40,489.71	64.83%	67.26%

Defendant's Exhibit A—(Continued)

SCHEDULE B-2

LEO LEBENBAUM, LESSEE
Miramar Hotel

Departmental Profit and Loss Statement

FOOD

	Amounts		Percentages	
	July 1 to July 15, 1944	Year To-Date	July 1 to July 15, 1944	Year To-Date
Sales				
Dining Room	$1,971.27	–$22,115.99	100.26%	99.84%
Room Service	2.75	172.32	.14	.77
Total Sales	$1,974.02	$22,288.31	100.40%	100.61%
Allowances	7.90	135.99	.40	.61
Net Sales	$1,966.12	$22,152.32	100.00%	100.00%
Cost of Goods Sold				
Cost of Goods Consumed	$ 786.64	$12,683.77	40.01%	57.26%
Less: Cost of Employees' Meals	343.65	– 4,089.28	17.48	18.46
Cost of Goods Sold	$ 442.99	$ 8,594.49*	22.53%	38.80%
Gross Profit	$1,523.13	$13,557.83	77.47%	61.20%
Departmental Expenses				
Salaries and Wages	$ 729.93	$ 7,857.29	37.13%	35.47%
Employees' Meals	125.00	1,673.22	6.36	7.54
Laundry	65.60	1,010.94	3.34	4.60
Fuel		374.13		1.69
Utensils	3.28	86.68	.17	.39
Cleaning Supplies	90.81	297.10	4.61	1.33
Contract Cleaning		37.50		.17
Paper Supplies	7.74	74.94	.39	.34
Glassware	24.39	65.99	1.24	.29
Decorations		26.04		.12
Menus		30.97		.13
China		131.00		.59
Silver		64.74		.29
Miscellaneous		46.74		.21
Total Expenses	$1,046.75	$11,777.28	53.24%	53.16%
Departmental Profit	$ 476.38	$ 1,780.55	24.23%	8.04%

Defendant's Exhibit A—(Continued)

SCHEDULE B-3

LEO LEBENBAUM, LESSEE
Miramar Hotel
Departmental Profit and Loss Statement

BEVERAGES

	Amounts		Percentages	
	July 1 to July 15, 1944	Year To-Date	July 1 to July 15, 1944	Year To-Date
Sales	$5,087.84	$58,418.73	100.00%	100.00%
Cost of Goods Consumed	969.75	16,903.94	19.06	28.94
Gross Profit	$4,118.09	$41,514.79	80.94%	71.06%
Departmental Expenses				
Salaries and Wages	$ 516.83	$ 4,852.81	10.16%	8.31%
Employees' Meals	15.00	457.21	.29	.78
Laundry		57.44		.10
Ice	56.58	608.65	1.11	1.04
Bar Supplies		243.94		.42
Glassware	107.46	324.34	2.11	.55
Licenses and Taxes	15.77	224.76	.31	.38
Cabaret Tax	617.57	*5,938.97	12.14	10.17
Watchman		245.00		.42
Bartenders' Commission		270.38		.46
Guest Supplies		25.67		.04
Sales Tax	110.01	1,296.17	2.17	2.22
Miscellaneous		16.50		.03
Total Expenses	$1,439.22	$14,561.84	28.29%	24.92%
Departmental Profit	$2,678.87	$26,952.95	52.65%	46.14%

SCHEDULE B-4

CIGAR STAND

	Amounts		Percentages	
	July 1 to July 15, 1944	Year To-Date	July 1 to July 15, 1944	Year To-Date
Gross Sales	$ 140.60	$ 1,160.58	100.00%	101.31%
Allowances		15.05		1.31
Net Sales	$ 140.60	$ 1,145.53	100.00%	100.00%
Cost of Goods Sold	45.00	891.18	32.01	77.80
Departmental Profit	$ 95.60	$ 254.35	67.99%	22.20%

Defendant's Exhibit A—(Continued) SCHEDULE B-5

LEO LEBENBAUM, LESSEE
Miramar Hotel
Departmental Profit and Loss Statement
TELEPHONE

	Amounts		Percentages	
	July 1 to July 15, 1944	Year To-Date	July 1 to July 15, 1944	Year To-Date
Gross Sales				
Local Calls	$ 74.50	$ 860.63	25.78%	30.00%
Long Distance Calls	214.52	2,022.51	74.22	70.51
Total Gross Sales	$ 289.02	$ 2,883.14	100.00%	100.51%
Allowances		14.60		.51
Net Sales	$ 289.02	$ 2,868.54	100.00%	100.00%
Cost of Calls				
Long Distance	$ 178.47	$ 1,866.88	61.75%	65.08%
Rental of Equipment	134.38	917.20	46.50	31.98
Total Cost of Calls	$ 312.85	$ 2,784.08	108.25%	97.06%
Departmental Profit or *Loss*	$ *23.83*	$ 84.46	*8.25%*	2.94%

SCHEDULE B-6

OTHER INCOME

	July 1 to July 15, 1944	Year To-Date
Valet		$ 7.29
Guest Laundry		5.36
Telegrams	$ 10.91	9.08
Radio	2.00	35.00
Vending Machines	25.80	161.25
Juke Box	27.75	524.20
Pin Ball		24.90
Garage	5.00	55.00
Fire Wood	180.50	14.90
Cash Discounts Earned		44.14
Cash Variations	*1.65*	*133.72*
Sales Tax		.37
Beach	806.32	771.40
Swimming Pool		3.50
Miscellaneous	.25	.25
Fire Loss Adjustment		20.25
Sale of General Supplies	707.00	707.00
Total Other Income	$1,763.88	$2,250.17
Ratio to Room Sales	28.99%	3.74%

Defendant's Exhibit A—(Continued)

SCHEDULE B-7

LEO LEBENBAUM, LESSEE
Miramar Hotel

ADMINISTRATIVE AND GENERAL EXPENSES

	July 1 to July 15, 1944	Year To-Date
Salaries and Wages	$ 240.83	$2,359.43
Employees' Meals	39.00	470.68
Printing and Stationery	80.38	368.91
Telephone, Postage and Telegrams	64.82	332.62
Trade Association Dues	11.97	156.15
Office Supplies		153.98
Classified Advertising	53.58	214.15
Auto and Truck Expense	20.35	79.68
Workmen's Compensation Insurance	38.10	373.63
General Insurance	27.90	413.68
Payroll Taxes	165.92	1,624.80
Accountants' Fees	519.60	1,737.10
Legal Fees		475.86
Donations		50.00
Traveling		50.00
Bad Debts		11.18
Miscellaneous	1.68	338.52
Total Administrative and General Expenses	$1,134.49	$9,210.37
Ratio to Room Sales	18.65%	14.94%

SCHEDULE B-8

ADVERTISING AND BUSINESS PROMOTION

	July 1 to July 15, 1944	Year To-Date
Outdoor Signs		$ 330.00
Magazines and Other Publications	$ 49.96	536.14
Literature	352.75	745.02
Guest Entertainment		94.33
Miscellaneous	15.00	33.00
Preparation of Copy		209.60
Total Advertising and Business Promotion	$417.71	$1,948.09
Ratio to Room Sales	6.87%	3.16%

Defendant's Exhibit A (Continued)

SCHEDULE B-9

LEO LEBENBAUM, LESSEE

Mirmar Hotel

HEAT, LIGHT AND POWER

	July 1 to July 15, 1944	Year To-Date
Engineering Supplies		$ 334.00
Electric Current		1,617.91
Electric Bulbs		175.00
Fuel	$ 76.06	1,977.66
Water	56.90	579.74
Removal of Waste Matter	12.00	214.00
Total	$144.96	$4,898.31
Less: Sale of Fuel		60.03
Total Heat, Light and Power	$144.96	$4,838.28
Ratio to Room Sales	2.38%	7.85%

SCHEDULE B-10

REPAIRS AND MAINTENANCE

	July 1 to July 15, 1944	Year To-Date
Salaries and Wages	$ 766.58	$ 7,419.02
Employees' Meals	30.00	178.55
Furniture Store	664.32	1,467.19
Carpets and Rugs		125.87
Curtains, Shades and Drapes	80.65	726.22
Painting and Decorations	1.69	301.09
Electrical and Mechanical	469.43	1,609.75
Auto and Truck		112.76
Electrical Signs (Contract)	37.50	262.50
Springs, Mattresses and Pillows		819.75
Building		250.55
Grounds and Gardens	54.59	387.04
Total Repairs and Maintenance	$2,104.76	$13,660.29
Ration to Room Sales	34.59%	22.16%

Defendant's Exhibit A (Continued)

SCHEDULE B-11

LEO LEBENBAUM, LESSEE
Miramar Hotel

CAPITAL EXPENSES

	July 1 to July 15, 1944	Year To-Date
Rent, Taxes and Insurance		
Rent	$2,888.13	$30,435.83
Personal Property Taxes	3.84	11.52
Insurance	19.29	457.18
Total	$2,911.26	$30,904.53
Interest		
3%—90 Day (Renewable) Note	$ 48.04	$ 365.65
Amortization		
Leasehold Cost	$ 165.29	$ 2,148.77
Leasehold Improvements	28.02	253.54
Total	$ 193.31	$ 2,402.31
Total Capital Expenses	$3,152.61	$33,672.49

DEFENDANTS' EXHIBIT B

Miramar Hotel
Santa Barbara, California
Estimated Statement of Profit and Loss for
the Year Ended July 10, 1945

[Letterhead]

Horwath & Horwath
Accountants and Auditors
Subway Terminal Building
417 South Hill Street
Los Angeles 13, Calif.

September 18, 1947

Miramar Hotel
Santa Barbara, California

Gentlemen:

In accordance with our engagement, we have prepared an estimated statement of profit and loss of the Miramar Hotel for the year ended July 10, 1945.

The basis of this statement has been actual results at the Miramar in previous periods augmented by National averages indicated in Horwath and Hor-

wath's publications Hotel Operations in 1944 and 1945 and adjusted to results achieved in similar hotels during the period under review.

The results indicate a profit of $176,117.95 divided between lessor and lessee as follows:

Landlord (Rent)	$ 91,648.02	52.04%
Tenant (Remainder)	84,469.93	47.96
Total	$176,117.95	100.00%

Very truly yours,
HORWATH & HORWATH.

Our reports and certificates are issued with the understanding that they will not be published in whole or in part, nor used in connection with the issuance of any securities, without our written consent.

Comments

Rooms

Room sales were computed on the basis of 130 rooms available for rental at 94 per cent occupancy with an average daily rate of $4.53.

There were 134 rooms in the hotel. Of this total 4 were set aside for use by the management and

employees customarily receiving room and board.

The determination of a 94 per cent occupancy was made on the basis of Pacific Coast occupancy data compiled by Horwath and Horwath and occupancy shown by Santa Barbara hotels and similar so called resorts in Southern California. This was the occupancy figure used in the Mar Monte Hotel case before Judge McCormick and substantiated in Federal Court.

The average daily rate per occupied room, $4.53, is the average of rates appearing on the room rack as at June 10, 1944.

Departmental expenses and profit represent normal figures and are in line with similar operations during this period.

Food

Food sales were established on the basis of 32.3 per cent of room sales, the ratio in effect at the Miramar in July, 1944.

Food cost of 42 per cent, expenses and departmental profit represent normal expectancy from this operation.

Beverages

Beverage sales were computed at 83.6 per cent of room sales, the existing ratio at the time the Miramar was taken over.

Beverage cost of 33 per cent, expenses and departmental profit represent normal expectancy.

Beach Club

Sales, costs and expenses are purely conservative

estimates as these facilities were in use but a short while prior to army occupancy.

The results from this department are, however, not material to the operation as a whole.

Other Departments

Loss from telephone and other income have been eliminated as these would offset one another.

Various expense classifications follow with the percentage of room sales that each represents. These are experience factors.

Administrative and General	12.2%
Advertising and Business Promotion	3.0
Heat, Light and Power	5.8
Repairs and Maintenance	10.1

Rent

Rent, as presented on Schedule 5, was computed in accordance with the lease in effect and by use of the stated percentages.

Conclusion

The profit and loss statement indicates a house profit of $176,117.95. Rent, or the landlord's share, amounts to $91,648.02 with the remainder of $84,-469.93 representing the tenants' profit. Reduced to percentages, this means that the landlord would receive 52.04 per cent of the income and the tenant 47.96 per cent.

Miramar Hotel
Santa Barbara, California
Estimated General Profit and Loss Statement
Year Ended July 10, 1945

	Schedule	Net Sales	Cost of Sales	Expenses	Profit or Loss
Operated Departments					
Rooms	1	$202,053.05		$ 44,249.66	$157,803.39
Food	2	65,263.12	$27,410.51	39,288.40	—1,435.79
Beverages	3	168,918.31	55,743.04	40,033.64	73,141.63
Beach Club	4	15,300.00	4,391.00	1,461.80	9,447.20
Total Operated Departments		$451,534.48	$87,544.55	$125,033.50	$238,956.43
Deductions from Income					
Administrative and General Expense				$ 24,650.47	
Advertising and Business Promotion				6,061.59	
Heat, Light and Power				11,719.07	
Total Deductions				$ 42,431.13	
Repairs and Maintenance				$ 20,407.35	62,838.48
Total House Profit		$451,534.48	$87,544.55	$187,871.98	$176,117.95
Rent (Lessor)	5				91,648.02
Net Profit Available to Lessee					$ 84,469.93

SCHEDULE 1

MIRAMAR HOTEL
ROOMS

	Amounts	Percentages
Net Sales	$202,053.05	100.00%
Departmental Expenses		
Salaries and Wages	$ 28,893.63	14.3
Employees' Meals	1,010.27	.5
Laundry	9,496.49	4.7
Linen	1,010.27	.5
Guest Supplies	1,616.42	.8
Contract Cleaning	808.21	.4
Cleaning Supplies	606.16	.3
Other Expenses	808.21	.4
Total Expenses	$ 44,249.66	21.9 %
Departmental Profit	$157,803.39	78.1 %

STATISTICS

Number of Rooms Available	130
Percentage of Occupancy	94.00%
Average Daily Rate per Occupied Room	$ 4.53

SCHEDULE 2

MIRAMAR HOTEL
FOOD

	Amounts	Percentages
Net Sales	$65,263.12	100.00%
Cost of Goods Sold	27,410.51	42.00
Gross Profit	$37,852.61	58.00%
Departmental Expenses		
Salaries and Wages	$32,044.19	49.1 %
Employees' Meals	2,675.79	4.1
Laundry	1,566.32	2.4
Kitchen Fuel	587.37	.9
China, Glass, Silver and Linen	456.84	.7
Cleaning Expenses	522.10	.8
Menus and Stationery	261.05	.4
Other Expenses	1,174.74	1.8
Total Expenses	$39,288.40	60.2 %
Departmental Loss	$ — 1,435.79	— 2.2 %

SCHEDULE 3

MIRAMAR HOTEL
BEVERAGES

	Amounts	Percentages
Net Sales	$168,918.31	100.00%
Cost of Sales	55,743.04	33.00
Gross Profit	$113,175.27	67.00%
Departmental Expenses		
Salaries and Wages	$ 31,080.98	18.4 %
Employees' Meals	506.75	.3
Laundry	675.67	.4
Ice	4,391.88	2.6
Glassware	506.75	.3
Licenses	1,351.35	.8
Sundry Supplies	1,013.51	.6
Other Expenses	506.75	.3
Total Expenses	$ 40,033.64	23.7 %
Departmental Profit	$ 73,141.63	43.3 %

SCHEDULE 4

MIRARMAR HOTEL
BEACH CLUB

	Amounts	Percentages
Sales		
Cabanas	$ 6,000.00	
Food	4,800.00	
Beverages	2,400.00	
Cigars	2,100.00	
Total Sales	$15,300.00	100.00%
Cost of Sales		
Food	$ 2,016.00	42.0 %
Beverages	800.00	33.3
Cigars	1,575.00	75.0
Total Cost of Sales	$ 4,391.00	28.7 %
Gross Profit	$10,909.00	71.3 %
Departmental Expenses		
Salaries and Wages	$ 1,200.00	7.8 %
Employees' Meals	90.00	.6
Guest Supplies	91.80	.7
Other Expenses	80.00	.5
Total Expenses	$ 1,461.80	9.6 %
Departmental Profit	$ 9,447.20	71.7 %

SCHEDULE 5

MIRAMAR HOTEL
RENT

		Sales	Rent	
Rooms				
5⅓ Months @ 35%		$ 89,801.35	$31,430.46	
6⅔ Months @ 30%		112,251.70	33,675.50	$65,105.96
		$202,053.05		
Food				
Dining Room		$ 65,263.12		
Beach		4,800.00		
@ 5%		$ 70,063.12		3,503.16
Beverages				
Bar	$168,918.31			
Beach	2,400.00			
	$171.318.31			
5⅓ Months @ 15%		76,141.47	11,421.22	
6⅔ Months @ 10%		95,176.84	9,517.68	20,938.90
		$171,318.31		
Beach—Cabanas @ 35%				2,100.00
Total Rent				$91,648.02

The lease calls for a percentage rent on sales as follows:

Rooms	35%
Food	5%
Beverages	15%
Cabanas	35%

If during any calendar year the total percentage rent reaches $45,000.00 the percentages on rooms and beverages are reduced 5% each for the balanee of that year. In the above computation, percentage rent reached $45,000.00 on approximately June 10 on a calendar year basis.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 308, inclusive, contain the original Order to Deposit Funds Under Military Appropriations Act; Memorandum of Conclusions, Judge Hollzer, June 30, 1945; Notice of Motion for an Order Directing the Plaintiff to Deliver Possession of Premises to Defendant Leo Lebenbaum; Notice of Motion for an Order Excluding Certain Defendants from Participation in Trial Proceedings; Notice of Motion for an Order Releasing Deposited Funds; Notice of Opposition to Order Directing the Plaintiff to Deliver Possession of the Premises to the Defendant Leo Lebenbaum; Notice of Opposition to Order Releasing Deposited Funds; Memorandum of Conclusions—Judge Weinberger, April 30, 1946; Stipulation in re Surrender of Possession of Miramar Hotel to Leo Lebenbaum, Tenant; Stipulation in re Surrender of Possession of Portions of Property Taken by the United States; Receipt; Petition for Withdrawal of Funds on Deposit; Responsive Statement of Plaintiff in Connection with Defendant's Petition for Withdrawal of Funds on Deposit; Receipt; Third Amended Complaint in Condemnation; Stipulation for Judgment (Including Deficiency); Judgment and Decree in Condemnation (Including Deficiency); Stipula-

tion and Assignment of Interest in Award; Notice of Motion to File Answer to Third Amended Complaint and Cross Complaint, etc; Answer to Third Amended Complaint and Cross Complaint (including Exhibit B only); Answer of Defendant Leo Lebenbaum to Second Amended Complaint; Stipulation re Payment of Portion of Award and Order for Payment of Funds on Deposit with the Registry of the Court; Memorandum of Conclusions—Judge Weinberger, August 25, 1948; Letter dated October 6, 1948 to Judge Weinberger from Thomas H. Hearn; Letter dated October 13, 1948 to Judge Weinberger from Hill, Morgan & Farrer; Proposed Findings of Fact and Conclusions of Law Upon Distribution of Award Provided for by Judgment and Decree in Condemnation Proposed and Requested by Defendants Gawzner; Memorandum re Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment Upon Distribution of Award Provided for by Judgment and Decree in Condemnation; Notice of Appeal of Defendants Gawzner; Undertaking on Appeal and to Stay Execution; Notice of Appeal of Defendant Lebenbaum filed May 13, 1949; Costs Bond on Appeal; Notice of Appeal of Defendant Lebenbaum filed May 16, 1949; Stipulation and Order for Extension of Time for Filing Records on Appeal and Docketing Appeals; Personal Stay Bond; Stipulation and Order for Extension of Time for Filing Records on Appeal and

Docketing Appeals and Joint Designation and Stipulation for Transcript of Record; Stipulation as to Record on Appeal; Concise Statement of Points on Which Defendants and Appellants Paul and Irene Gawzner Intend to Rely on Appeal and Statement of Points on Appeal of Defendant Leo Lebenbaum and full, true and correct copies of Minute Orders Entered April 30, 1946 and September 20, 1948 which, together with copy of reporter's transcript of proceedings on January 17, 1947, February 28, 1947, March 18, 19, 20, and 21, 1947, April 25, 1947, May 12, 1947, June 6, 1947, August 14, 1947, October 22, 1947 and January 23, 1948 and original Defendants Gawzner exhibits 1, 2 and 3 and original Defendant Lebenbaum exhibits A and B, transmitted herewith, constituted the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.40 which sum has been paid one-half by each of the appellants and cross-appellant.

Witness my hand and the seal of said District Court this 22nd day of July, A.D. 1949.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12299. United States Court of Appeals for the Ninth Circuit. Paul Gawzner and Irene Gawzner, Appellants, vs. Leo Lebenbaum, Appellee. Leo Lebenbaum, Appellant, vs. Paul Gawzner and Irene Gawzner, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed July 23, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12,299

PAUL GAWZNER, et ux.,

Appellants.

vs.

LEO LEBENBAUM,

Appellee.

LEO LEBENBAUM,

Appellant,

vs.

PAUL GAWZNER, et ux.,

Appellees.

STATEMENT OF POINTS ON APPEAL TO BE RELIED UPON IN THIS COURT

Appellant, Leo Lebenbaum, adopts the Statement

of Points on Appeal filed in the District Court as his Statement of Points to be relied upon in this Court.

Dated: July 29, 1949.

PAUL R. COTE,

By /s/ PAUL R. COTE,

Attorney for Appellant,
Leo Lebenbaum.

Received copy of the within document this 29th day of July, 1949.

HILL, MORGAN & FARRER
STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,

Attorneys for Paul and
Irene Gawzner.

[Endorsed]: Filed Aug. 2, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS ON WHICH APPELLANTS AND CROSS APPELLEES INTEND TO RELY.

Now Come Paul Gawzner and Irene Gawzner, Appellants and Cross Appellees, and adopt the

Concise Statement of the Points on which Defendants and Appellants Paul Gawzner and Irene Gawzner intend to rely on appeal, filed in the District Court and already appearing as a part of the record on appeal herein, as the Concise Statement of Points on which they intend to rely on this appeal.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL.

By /s/ STANLEY S. BURRILL,

Attorneys for Appellants and Cross Appellees Paul Gawzner and Irene Gawzner.

Received a copy of the foregoing this 29th day of July, 1949.

PAUL R. COTE,
By /s/ PAUL R. COTE,

Attorney for Cross Appellant and Appellee Leo Lebenbaum.

[Endorsed]: Filed Aug. 2, 1949.

[Title of Court of Appeals and Cause.]

JOINT DESIGNATION OF RECORD TO BE PRINTED

It Is Hereby Stipulated by and between Paul Gawzner and Irene Gawzner, Appellants and Cross

Appellees, and Leo Lebenbaum, Cross Appellant and Appellee, through their respective counsel, that the following joint designation shall constitute the record which is material to the consideration of the appeal and cross appeal in the above entitled cause:

To the Clerk of the Above Entitled Court:

You Are Hereby Requested and Directed to cause to be printed as the record on appeal in the above entitled cause the parts of the record, proceedings and evidence transmitted to you by the Clerk of the District Court and set forth in the Joint Designation and Stipulation for Transcript of Record, except as follows:

1. In Designation No. 4 please omit Paragraphs VI to XIX, inclusive, of the Cross Complaint of Paul Gawzner and Irene Gawzner.

2. Please omit Designation No. 7.

3. Please omit Designation No. 19.

4. Please omit Designation No. 26.
(See Item 5 following.)

In addition to the foregoing record will you please cause to be printed as a part of the record the following:

5. Agreed Statement as to Record of Testimony transmitted to you herewith, being an agreed summary of the pertinent testimony included in the Reporter's Transcripts of the proceedings.

6. Concise Statement of Points on which Appellants and Cross Appellees intend to rely filed by Paul Gawzner and Irene Gawzner.

7. Statement of Points on Appeal to be relied upon in this Court filed by Leo Lebenbaum.

8. This Joint Designation of Record to be Printed.

Dated this 29th day of July, 1949.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL.

By /s/ STANLEY S. BURRILL,

Attorneys for Appellants and Cross Appellees Paul Gawzner and Irene Gawzner.

PAUL R. COTE,

By /s/ PAUL R. COTE,

Attorney for Cross Appellant and Appellee Leo Lebenbaum.

[Endorsed]: Filed Aug. 2, 1949.